THE

## STUDENTS Companio O R, //// 0/130

## REASON of the LAW. lohn. containing MAN.

Readings on the Common and Statute Laws of this Realm, alphabetically digested under proper Heads. Clearing and illustrating in the faid Readings, the most difficult Points not only in the Statutes, but likewise in several hundred Cafes in LAW and EQUITY. equality

Defigned to convey to all Students and others, the Fundamental Grounds, Reasons and Maxims of our Laws in General, in a plain and eafy Method, collected from Authors of the best Authority.

By GILES JACOB, Gent. AUTHOR of The Law Didionary.

#### The Third Edition.

- For Students of all Kinds, whether in the Profession of the Law, or Gentlemen out of it, this Book is generally adapted: As it
  - hath been my favourite Work, it hath of Consequence cost me
  - unfual Labour, and I hope, it will appear to be fo beneficial to

the World, that it will meet with an adequate Reception.'

See Preface.

#### In the SAVOY

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RIGHT HONOURABLE

Sir PETER KING, Kt.

Lord CHIEF JUSTICE

OFTHE

Common Pleas.

My LORD,

A S Merit, when confpicuous, cannot be too frequently Address'd, and Your Lordship's

thip's Great Abilities are universally acknowledged; therefore this second Offering of my Labours in the Law, attends Your Lordship for Patronage and Protection.

I confess the Difficulty of my present Undertaking, is sufficient to determe from the Dedication of my weak Endeavours to Your Lordship: But the Subject of this Trea-

DEDICATION. Treatife being on the Reason of our Laws, who could I fly to for Countenance and Encouragement; And whom could I Address of equal Power and Influence to filence Envy and Detraction, or of extensive good Nature to Pardon my Defects, like unto the Lord Chief Justice KING?

These Things, my Lord, are what all Authors

## DEDICATION.

thors naturally point to, and which we are as fond of confulting, as Mariners are their favourite Planet; and I humbly hope will plead my Excuse for the Freedom now taken by him who is,

My LORD,

Your Lordship's

Most Dutiful, and

Most Obedient

Humble Servant,

Giles Jacob.

# PREFACE.

THE utmost Perfection of Man is Human Reason; which is a Noble Dictation of the Mind, that teaches him to distinguish Good from Evil: This tells him his great Duty of Doing by others as he would be done unto, and keeps him steady in the Pursuit of his truest Glory.

It is the Essence of the Soul, which sets a Man above the Brute Creation, and renders him a Heavenly and God-like Creature: It inspires him with Wisdom to search after Truth, and endows him with that Philosophy, which alone can make his Being Happy. In a Publick View, it is the great Basis of Arts and Sciences; A 2 the

the Original of whatever brings Prosperity to Kingdoms; the lasting Honour and Continuance of all true Politicks; and the only Support of all Laws and Ordinances, for the Government of Mankind. In short, it is the very Key of Knowledge, and Helm of all our Actions, as well in Publick as Private Life.

Thus much for defining what is Reason in general. I now come to my present Treatise on the particular Reason of the Laws of England, which are universally allowed to be the most Rational and Excellent Composition of Laws upon Earth: And after an assiduous Study of near Twenty Years Duration, and the most obstinate Searches into their Rise and Origin, I think I have discovered the main Footsteps to them, and the Fundamental Principles on which their great and noble Structure is built.

I own

I own we have had many very great Men of superior Excellency, who have learnedly Treated of the Reason of our Laws. Of these I could instance Bracton and Britton, Littleton, Lord Coke, Plowden, Wingate, and others, whom I have Read and Studied, and very much Reverence; but I hope I may have the Liberty of Saying, that in all their Elaborate Treatises, the Reader, for want of a due Method is generally in a Wilderness, and like a Traveller in a Wood without a Guide, who, when once he is got in, is oftentimes sure to be lost, and not to find his Way out.

This has been the great Misfortune and Discouragement to Students: To obviate which, and bring Things into the Light, it hath been my principal Care to trace and lay open a Way that is new, nearer of Prospect, and not incumber'd; and though.

though I am therein obliged to our greatest Writers on the Subject, for some of my choice Flowers of Reason, yet I must say it, as a common Justice to my self and others, that in the following Work, the greatest Part of the Reasoning is my own. My Method is something in the Nature and Manner of Case and Opinion, or brief Commentary: Under what I call Case, is a short Body or View of the Law in its most useful and essential Points, which I have carefully gathered from our most valuable Authors of the best Reputation; and at the Foot of it is the Opinion, containing the Reason and Foundation of it. Also in this Second Edition, further to recommend it, I have added above Fifty entire new Heads to the former, (which are likewise very much enlarged and improv'd) and

and a new Introduction to the Study

and Practice of the Law.

For Students of all Kinds, whether in the Profession of the Law, or Gentlemen out of it, this Book is generally adapted: As it hath been my favourite Work, it hath of Consequence cost me unusual Labour; and I hope it will appear to be so Beneficial to the World, that it will at least meet with the Reception and Encouragement which hath attended my younger and less Finish'd Studies.

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## INTRODUCTION

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# Study and Practice

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# LAWS OF ENGLAND.

It is by all Perfons accounted very tedious and difficult; and this is principally occasioned by the great Number of Volumes containing the Learning of the Law, which are for the most part written without any Method, Order or Connection. As I have observed in my Preface, the Law Reader is generally in a Wilderness; and when he has travelled through the great Labyrinth, is often so confounded and fatigued, that he hath made sew Observations or Improvements for his own Use and Benefit, or the Advantage of others. It is this Reslexion that

### INTRODUCTION, &c. ii

Examination into the Cause of these Disficulties and Inconveniences, and to endeavour to lay down some plain and easy Rules for pursuing a Course of Law Study, from the Student's first setting out to his Arrival at Practice; wherein I shall briefly treat of the following Heads.

1. Of the Qualifications requisite in a Law-Student.

2. Of the Books necessary to be perused, and the Perfection and Defects of Law-Books.

3. Of Digesting and Applying what is

Read to the best Advantage.

4. Of the Way to procure Practice and Reputation in the Profession of the Law.

A Law-Student should originally, as the Foundation of all the Rest, be endowed with a great deal of good Sense and Wit, which must be improved by a proper Education, and be perfected by adequate Learning. Without a large Share of natural Sense, and much Acuteness, it will be impossible for a Person to distinguish Things so as to acquire a competent Knowledge of the Law; and without Learning he will be unqualished to read many useful Books on the Subject, or rightly to understand those

## iii INTRODUCTION, &c.

wholly educated for any handycraft Labour, as the Trade of a Blacksmith, Carpenter, Shoemaker or Taylor, is by no Means Qualified to be a Law-Student, without some further and more liberal Education: But the Son of a Carpenter, a Shoemaker, Blacksmith, &c. bred up as a Gentleman, by the good Circumstances of his Parents, may well make a very considerable Progress in Law-Studies; of which there have been many and great Instances; for here Nature is carried into another Chanel.

After a Youth of Parts hath gone thro' fome Years of School Learning, and is a pretty good Master of the Latin Tongue, it may not be improper for him to go to one of the Universities for two or three Years, where in some well regulated College he may render his Literature more universal: Tho' there is one Thing I take to be of greater Concernment than that; which is a Clerkship of three or five Years to an eminent Attorney, without which a Man will never be throughly able to advise Practifers who shall apply to him for Counfel when he is at the Bar; and the want of this Ground-work hath caused some of our old Attornies to know a great deal more of the Common Law and the Practice of it, than many Counsellors.

## INTRODUCTION, &c.

Nor is this Part of Education, as I may call it, of the Law-Student, any Difreputation or Objection to him in other Respects; for it is well known that a late very great Lord Chancellor, and Lord Chief Baron, and the present Master of the Rolls. with the Attorney General of England and Solicitor General of Ireland, all of them Men eminently Distinguish'd, served an Honourary Clerkship, at least, to Attornics at Law.

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The Student being regularly Educated and placed in one of the Inns of Court, for the Profecution of his Studies, I shall now inform him what Books are necessary there-First, The Terms of the Law is a very useful Treatise, from whence not only the Definitions of Words and Terms may be learn'd, but likewise a tolerable Knowledge of the Grounds of the Law. Next, I think, the Book called Doctor and Student is proper to be read, the Method of which, by Way of Question and Answer, is both instructive and entertaining. And then perhaps this Work called, The Student's Companion, for the useful Design of it, may be thought worthy of Perusal. After which Littleton's Tenures, and the learned and elaborate Coke upon Littleton should be taken in Hand, but with great Courage and Resolution, not to sink under the feverest Study. Then the Year-Books,

and

## v INTRODUCTION, &c.

and the best Reports, Ancient and Modern; and lastly the Abridgments of the Law, to continue in Memory what has been gathered from the other Books. Of these Abridgments there are many; Nelson's is the last, and a good Abridgment of the Reports; but Mr. Nelson made himself some Enemies by his great Aversion to the Coif, as he apprehended it cover'd Heads with little in them.

As to the Crown-Law, Staundford's Placita Corona, Sir Matthew Hale's Treatife on that Subject, the Lord Coke's Fourth Institute, and Serjeant Hawkins's Pleas of the Crown, are to be carefully read over by the industrious Student. Judge Hale's Book is an admirable Index of Matter to a larger Work, which that great Man intended, but did not go through with; tho' Mr. Hawkins has supply'd this Defect, who hath given us a learned System of the Crown-Laws.

For Practice you are to read Coke's, Raftal's, Cliff's and Lilly's Entries; also Bridgman's, Lilly's and my Accomplish'd Conveyancer, and the best Practical Treatises of the Business in the several Courts, &c. Nor ought the Student to neglect reading the Statutes at Large and Abridgments of them; Natura Brevium, and other Books of Original Writs and Process. And then my Common and Statute-Law Commonplac'd, and New Law-Distionary, and the ingenious Dr. Wood's Institute of the Laws

INTRODUCTION, &c. vi

of England, are very worthy to be read by all Students; but that learned Civilian, Common Lawyer and Divine, hath made Coke's Reports so much his favourite Study and Foundation, that he hath omitted taking Notice of many others of great Authority, and entirely all the late Re-

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When a Student hath enter'd upon reading any Law-Book, it is necessary that he should pursue his Study with as great Diligence as his Strength of Constitution will permit. I have known fome Men read through a thin Folio in a Day; and have myself done the same; but this is too Violent for the Body and Mind. It is certain that over-much Study creates great Confusion, and keeps a Man back as effectually as the neglecting of it: The middle Path, as in all other Cases is the furest, to facilitate and accomplish what is under-taken. But let no Pleasure interrupt you in your usual Hours of Study; for breaking off abruptly disturbs the Memory, and unfettles the Thoughts, to the great Loss of Time.

After a Treatife is fully read over, ask your felf the Question, What Knowledge you have gained thereby? Do this immediately, and the Answer conceived in your Mind, instantly pen down under Heads, just as the subject Matter presents

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## vii INTRODUCTION, &c.

it felf to you, and afterwards more methodically, on comparing the same with the Book, and referring to the Pages where it is to be found, in the Way of Alphabet; (and if the Treatise be large, and your Memory treacherous, it will be necessary to make Remarks as you proceed, or at the End of every Chapter). Then peruse these Heads often, and when you have gone through all the Books, reduce the several Alphabets of your Collections into one grand Alphabet, in a general Common Place-Book, without which no Man can be a thorough Lawyer.

Thus I have, in a finall Compass, brought the Student to the End of his Study; but though I recommend to him to have a large Common Place-Book, I do not in the least infinuate that the Person who has the largest is the greatest Lawyer, any more than I do that he is, who hath the greatest Head: Things must be clear and well digested in both Cases, to make a

Man compleat.

Now I am leading the young Lawyer to the Bar, to the Practice of his Knowledge. At a Man's first Appearance in the Courts of Judicature, some Modesty is requisite to engage the Attention and Favour of the great Personages whom he applies to: Afterwards perhaps it may not be so Advantagious, when he has confirmed his Learning by Practice and Experience; for old

## INTRODUCTION, &c. viii

old Stagers of the Law will over-bear and beat down young Disputants, if they do not properly exert themselves; and some times strong Lungs are to atone for the Desiciency under the full-bottom'd Peruke: Therefore, young Gentlemen, have Courage, and Talk upon Occasion, as much as your Neighbours, if you intend to succeed.

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There are a certain Sort of Pleaders, who are very fond of shewing their low Wit and Buffoonry, in Law Arguments in Westminster Hall; but they ought to confider that the Courts there, are not a proper Stage for the displaying of those Things. Some are ever making nice and cavilling Exceptions, often exhibiting twenty for one allowed of by the Court; though this Method of Proceeding may fet forth their Learning, it betrays a Weakness in their Judgment, which should direct them only to fuch as are well Founded and of Con-Likewise some Barristers, to fequence. fhew that they have turn'd over or thumb'd five hundred Volumes, will have almost as many Quotations to maintain one fingle Point of the Law; when at the same Time it often unluckily appears, by their stating the Point, and the Matter laid down, that they do not rightly understand any one of the Books quoted.

## ix INTRODUCTION, &c.

These last Observations, together with the others of like Nature, interspersed in this Introduction, are wholly intended by Way of Caution to all young Gentlemen, that they may carefully avoid whatever will expose them to Contempt and Ridicule. I shall only observe further, that however forward any ingenious Persons may be in speaking in the Courts at Westminster, on due Consideration of their Clients Cases; I would advise them to be backward in common Conversation, on the Subject of Law, when they are unprepared, lest they should thereby forfeit or lessen their Characters.

And a Character, acquir'd at the Expence of many Years Study and Application to Business, may possibly be lost in one fatal

Minute.

#### THE

# Student's Companion:

OR, THE

# Reason of the LAW.

#### Actions.

N Action is defined to be the Form of a Suit given by Law for Recovery of that which is a Man's Due: Or it is a legal Demand of a Man's Right.

There are Actions Real, Personal and Mix'd of Debt, Case, Trespass, &c. All Real and Mix'd Actions, Waste and Ejectment, relating to Lands, must be laid in the same County where the Lands lie; but Personal and Transitory Actions, such as Debt, Detinue, Assault, &c. may be brought in any County. The 6 R. 2. ordains, That Writs of Debt and Account shall be commenced in the Counties where the Contracts were made; but that Statute was never put in Use; and yet generally

#### The Student's Companion:

rally Actions have been laid in the County where the Cause did arise. Co. Lit. 282.

The Reason why Real Actions, concerning Lands and Tenements, are to be brought in the County where the Lands lie, is as follows:

Because the Law supposes that there the best Conusance of the Action may be had, by the more immediate Knowledge of the Thing in Question. And as a fair Trial is what the Law every where provides for, so here is no Room to doubt it, as perhaps there might be in another County, by a strange Jury: Besides, it is very much for the Ease of those who attend on Causes. And the Difference between Real and Personal Actions is so great, that 'tis sitting the Real Action should be absolutely tied to the County, if the other be not so.

### Acceptance.

A Cceptance is that Accepting of any Thing from another, which amounts to a tacit A-greement to a preceding A&, which might have been avoided, if such Acceptance had not been.

If Tenant in Tail makes a Lease for Years, not warranted by the Statute 32 H. 8. rendring Rent, and dies; if the Issue accepts the Rent, it shall bind him. 3 Leon. 36. But if a Parson, &c. make a Lease for Years not warranted by Statute, so that 'tis void by his Death; Acceptance by the Successor will not make it good. 1 Saund. 241. Baron and Feme seised of Lands in the Feme's Right joining in a Lease reserving Rent; if the Baron dies, and the Feme accepts the Rent, the Lease is confirm'd. 1 Inst. 373. And if an Insant accepts of Rent at his full Age, it makes his Lease good, and shall bind him.

A Leffee

A Lessee for Term of twenty Years, accepts of a Lease of the same Land, for ten Years, the Term of twenty Years is determined in Law, by the Lessee's Acceptance of the new Lease. 2 Roll. 469.

Acceprance of Rent is a tacit Acknowledgment of the Tenant's Title, where a Lease is voidable only, and not void: And by Acceptance of a new Lease, the Lessee acknowledges the Lessor's Power to make it, and so determines the former.

#### Accufation.

DY the Laws of England, no Man is to Accuse, nor shall he be forced to alledge that which makes against himself; but a Criminal may in all Cases plead Not guilty, and put himself upon his Country, who are to find him Guilty, by the Testimony of Witnesses. And by Magna Charta, no Man shall be imprison'd or condemned on any Accusation, without Trial by his Peers, and the Law of the Land. 4 Co. Inst. 9.

As no Person by Law may be his own Judge, either to acquit or condemn, so none is to accuse himself; which would amount to Judgment. And as to Trial of Persons accused, by their Peers; Peers (viz. Equals) are the most proper Judges of Offences of Peers, by Reason they may best make the Case their own.

#### Additions.

A Ddition signisseth a Title given to a Man, befides his Christian and Sir-name; setting forth his Estate, Degree, Trade or Profession, also his Place of Residence, &c. In Actions where Process

B 2

of Outlawry lies, Additions are to be made to the Name of the Defendant, of his Estate, Calling and Place of Dwelling; and Writs without such Additions shall abate, on Exceptions taken thereto.

Stat. 1 H. 5. cap. 5.

Titles of Gentleman, Esquire, &c. being Additions ad libitum, and as People please to call them, may be used or not, or varied: And by Pleading to Issue, the larry passes by the Advantage of Exception for Want of Addition; for by the Common Law, Process is good without it, and the Statute gives Remedy only by Exception. 1 Roll. Abr. 780.

Additions are required for the greater Certainty of knowing Persons, and that one Man may not be molested for another, but every Person who has offended the Law, may bear his own Burden; and to prevent the false Imprisonment of Persons.

#### Age.

AGE, in the Law, fignifies those special Times which enable Men and Women to do certain Acts: As for Example, a Man at twelve Years of Age, is to take the Oath of Allegiance; at fourteen (his Age of Discretion) may consent to Marriage, be a Witness, &c. and at twenty-one, his full Age, he may Alien his Lands, Tenements, Goods and Chattels. A Woman at the Age of nine Years, is Dowable; at twelve (her Age of Discretion) she may consent to Matrimony; and at twenty-one, alienate her Lands. Co. Lit. 78.

These are the particular Ages appointed by Law, for Persons to act in the Assairs of the World; and 'tis the Age of twenty-one which enables a Man to contract and deal for himself, with Security to those

who deal with him.

Before

Before that Time, his Acts are in most Cases either void or voidable.

Tis reasonable, that the A&s of Minors should not be Binding; because for want of Years and Judgment, they are incapable of Thinking, and considering Things as they ought; and the Law is always Tender to take Care of those, who, through Want of Discretion, cannot take Care of themselves.

#### Allegiance.

A Llegiance is the legal Obedience, which the Subject owes to his Prince. This Allegiance is an Incident inseparable to every Subject; for as soon as he is born, he oweth by Birth Right, Ligeance and Obedience to his Sovereign: And it cannot be local or confined to any certain Place or Kingdom, but follows the Subject wheresoever he goeth. 1 Inst. 129.

If a Man abjure the Kingdom, he still oweth the

King his Allegiance.

Protection from the King draws Subjection, and Subjection Protection. As a King protects his Subjects, he hath a Right to their Allegiance and Obedience; Obedience and Submission being the Conditions of that Protection. And notwithstanding Abjuration, a Subject remains within the King's Protection, because the King may Pardon and Restore him to his Country.

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#### Alienations.

To alien fignifieth to transfer the Property of any Thing to another Person; as to alien in Fee, is to sell the Fee-simple of any Lands or Tenements.

If a Man make a Feoffment, or any other Conveyance of Land in Fee, upon Condition, that the Person, to whom the Land is conveyed, shall not take the Profits; this Condition annexed to the Estate, is contrary to Law, and the Estate adjudged absolute. And in such Conveyance in Fee, a Condition not to alien is void; but 'tis otherwise in Cases of Tenants in Tail, Leases for Life, or Years, &c. Co. Lit. 206. Hob. Rep. 261.

It is incident to every Estate in Fee-simple, that he that is seised of such an Estate, may alien; but in Estate-tail, there is a secret Intent, that no

Alienation shall be made. Doll. & Stud.

The Reasons to be given for these, may be the following:

If a Man were debarr'd from the Profit of the Land, it being the Thing it self in Substance, he would take nothing by the Conveyance: And every Conveyance should transfer to the Person, to whom made, the same Power as the Person who made it; otherwise he can't make the most of the Thing granted, for which he hath paid a Consideration; for which Reasons, Conditions not to alien, &c. are repugnant and void. But where Estates are made to Tenants in Tail, or for Life, &c. These Restraints are good; because they only prevent the Tenants doing what they have no Right to do, for Want of a Fee-simple.

In a Conveyance in Fee, a Condition not to alien to any particular Person, may be adjudged good in Law.

Because the Alienee may convey to any others, except such Person, and thereby not be hindred of the Benefit of his Grant

#### Aliens.

A LIENS are those which are born in a strange Country, out of the Allegiance of the King. And such Aliens, being Alien Friends, may gain Goods and personal Estate by Trade, &c. But are incapable of Lands of Inheritance, or of Houses, only of Habitation, as Merchants. And Alien Enemies cannot get any Thing lawfully within this Realm, or maintain any Action, &c. 1 Inst. 129.

If an Alien purchase Lands, the King on Office

found shall have it.

An Alien may not be Heir to any one. An Alien Wife shall not have Dower. Aliens may not be sworn on Juries; or have any Vote in Choice of Members of Parliament. 1 Inst. 31. 3 Inst. 27. Hob. 270.

And Aliens are incapable to bear Offices, &c. by

Stat. 12 W. 3.

As Trade is for the Advantage of all Kingdoms, Merchant-Strangers are politically permitted to come into any Country, and to acquire Perfonal Estate, &c. therein, for carrying on Merchandise; but in all other Cases Aliens are denied the Privileges of Subjects, unless made free by Naturalization.

#### Amercements.

A Mercement is a pecuniary Punishment of an Offender; and it is properly a Penalty set by a Man's Peers or Equals for the Offence done, for which he putteth himself at the Mercy of the

King or Lord.

Amercements are a more merciful Penalty than a Fine, and are imposed by the Country; whereas a Fine is set by the Court. By Magna Charta, Persons are to be amerced in all Cases proportionably to the Offence, and that by their Peers. And Amercements are inflicted for a great many Offences, Faults and Negligences. 1 Inst. 116. 8 Rep. 39.

In Punishments of Offences, Mercy ought to be temper'd with Justice, on considering the Offender's Circumstances liable to be amerced and pupished.

### Appeals.

A PPEAL is an Accusation of a Murderer, by a Person who had Interest in the Party murdered.

Appeals are to be prosecuted within a Year and a Day after the Death of the Person murdered; and may be brought by the Heir Male, for the Death of his Ancestor, by the Wife, for the Death of her Husband, &c. And this may be done, where a Criminal is acquitted on his Trial, or where he is convicted of Manslaughter, upon an Indictment, so as it be before Judgment, and the Benefit of Clergy be not had, 1 Inst. 287. 3 Inst. 131.

In Case of Acquittal of a Criminal, he may be bailed for a Year and a Day, for the Persons having Right, as the Wife, Heir, &c. to bring their Appeal. 3 Inst. 273. 3 H. 7. c. 1.

The Law appoints the next of Kin to the deceased to prosecute the Appeal, because they are supposed to be most zealous in bringing the Offender to Justice. When a Person is acquitted, it may be brought; for a Criminal may be unjustly acquitted; and when convicted of Manslaughter only, it is the same, because he is not convicted of the Offence: But when Judgment is given, and executed, it may not be had; for a Man may be but once punished for one Offence.

An Appeal of Robbery may be brought to have the Goods restored to the Person from whom taken; which by the Common Law could not be done on an Attainder, or an Indictment. 3 Inst. 242.

The Goods not being taken from the King, he is not fo proper a Profecutor, by Indictment, or otherwise, to have the Goods restored, as is the Party robbed.

A Man committing a Rape, if the next of Kin do not Appeal, may be attainted at the King's Suit; where the Woman consents after. H. P. C.

No Consent to Crimes shall bar the Execution of the Laws, but Punishment shall be had, so as one Person may not excuse another.

#### Arreft, &c.

NONE shall be arrested for Debt, Trespass, .

oc. but by Virtue of a Precept or Commandment out of some Court, by lawful Warrant,

or the King's Writ.

Attornies, &c. maliciously causing any Person to be arrested, where there is no Cause of Suit, shall suffer six Months Imprisonment, pay treble Damages, and sorfeit 10%. Sheriffs are not to grant Warrants for Arrests before they have in their Custody the Writs upon which such Warrants ought to issue, on the Penalty of 10% and Damages, and to pay a Fine to the King. Stat. 8 Eliz. c. 2. 43 Eliz. c. 5. And if a Bailist arrest a Man without Warrant from the Sheriff, though he afterwards receive a Warrant, it is false Imprisonment. Deer 244.

But it has been adjudged that if a Writ is actually out, the Sheriff may make a Warrant to his Officer to execute it before it is delivered to him.

2 Lutw. 1283.

The King's Writ, as the King hath the Execution of the Laws, is generally the proper Authority for the Arrest of a Subject; and without such Authority, or for unjust Vexation, it is reasonable a Punishment should be inflicted on Officers, &c. for restraining a Person of his lawful Liberty: Though when a Writ is out, it shall be intended to be delivered to the Sheriss, before the Arrest made.

An Officer must lay hold of a Man, or it will not be a lawful Arrest. And on an Arrest a Bailist ought to shew his Warrant, when the Party submits

mits himself to the Arrest, if required. 6 Rep. 54.

I Lill. Abr. 96.

By Stat. 12 Geo. 1. c. 29. if a Debt be under 10 l. on Process out of a superior Court, or under 40 s. in an inferior Court, the Desendant shall not be arrested, but be served with a Copy of the Process, &c. And for Debt of 10 l. or above, Affidavit is to be made of the Sum, on the Back of the Writ, for which Bail shall be taken, &c.

No Bailiff shall demand more than the Law allows for an Arrest or Waiting; or carry any Person arrested to Prison within twenty-four Hours, from the Time of the Arrest, &c. Stat. 2 Geo. 2.

All Writs express Arrest by the Words Capies and Attachias, for which Reason an Officer must actually lay hold of the Person. And the late Regulations by Statute, have been made to give a check to the abundant Growth of the Profession of the Law, and prevent Oppression.

#### Affault.

A SSAULT fignifies a violent Injury offered to a Man's Person; as where one Man beats another, &c. And to strike a Man, though he be not hurt with the Blow, or to strike at a Person, although he be neither hit nor hurt, hath been

held to be an Asfault. 22 Lib. Asf. Pl. 60.

If a Person in Anger lift up, or stretch forth his Arm, and offer to strike another; or menace any one with any Staff or Weapon, &c. it is an Assault in Law. And where a Man Assaults a Person, and beats or doth him any Manner of Violence, either with Hand, Foot or Weapon; or throws any thing at him, Drink in his Face, &c. whereby he is hurt, it is such an Assault for

which Action may be brought, and Damages re-

covered. Comp. Attorn. 133.

But to lay Hands gently upon another, not in Anger, is no Foundation of Action of Trespass and Assault. And a Man may justify an Assault in Desence of himself or his Wife, Father, Mother, Master, &c. Brast. 9 E. 4.

Affaults are a Breach of the Peace; and one great End of all Laws is to preserve the Peace on which the Welfare of Society depends. As to Injuries, a Man's Person is esteemed in Law beyond his Goods and Possessinary; and our Law holds no Damage a sufficient Remedy for a corporal Injury: But it is necessary that a Person should justify an Assault of another in his own Desence, &c. to avert, in some Measure, the Injury intended to himself.

## Allignment.

A Ssignment is the setting over the whole Interest a Man hath in a Lease or other Thing, unto another Person.

If Tenant for Years affigns his Estate, no Confideration is necessary; though some Confideration must be given in other Cases. 1 Mod. Rep. 263. An Assignee of Lands, if not named in a Condition, may pay the Money: But he shall receive no

Money, if he be not named. I Inft. 215.

A Landlord receives Rent of A. B. Assignee of C. D. his Tenant; and A. B. sinding the Rent of the House too great, assigns to John Doe; the Landlord who accepted of the first Assignee, as Tenant by receiving the Rent, shall not after the Assignment sue A. for any more Rent; for he that admits of one Assignee, admits of twenty. Comp. Attorn. 491.

No

No Confideration is requifite in Assignments of Leases, because the Tenure is subject to Payment of Rent, which is in itself a Consideration. An Assignee may pay Money on a Condition, to save the Forsciture of the Land, &c. And as to admitting Assignees, the Privity of Estate, &c. is thereby gone, and therefore the present Assignees are only liable.

#### Attainder.

A Trainder is, when a Man hath committed Treason or Felony, and being convicted thereof, Judgment hath passed upon him. And where one is Attainted by Judgment, for Offences punishable by Death, he is dead in Law. I Inft.

390. 3 Inft. 12.

By Statute, no Person is to be tried or attainted of High Treason, whereby Corruption of Blood may be made, but by the Oaths of two lawful Witnesses; unless the Party confess, stand Mute, &c. But a Person may be outlawed, and thereby attainted, if he does not come in and be tried; and he may be attainted by Act of Parliament. Stat. 7 W. 3. cap. 3.

The Justice of these Attainders hath been found Fault with by some Persons, but with little Reason, if we rightly consider their Nature, and the

great Security they are to the Government.

Where Criminals are attainted of Treason, two Witnesses are required, to make the Proof certain; but if they confess, which is a Self-Conviction, or stand mute, which strongly implies Guilt, it is otherwise. As to Attaints on Outlawries, if an Offender slies, it is as it were Circumstantial Evidence of his Crime. And certainly the Parliament, which makes Laws for punishing

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all Offenders, and all Crimes, may well enact Statures to attaint particular Criminals, where their Guilt is apparent, in extraordinary Cases, that they could not foresee would ever happen.

#### Aberment.

N Averment is an Offer to justify a Plea or other Thing; as the general Averment of every Plea, containing Matter affirmative, is to

conclude with hoc paratus est verificare, &c.

That which appears plainly to the Court, ought not to be averred: And Pleas meerly in the Negative, are not to be averred. Nor shall Averment be admitted against Presumption in Law; as where Rent being many Years behind, the Lord makes an Acquittance for the last that is due, which acquits the Whole; where a Woman is with Child, and her Husband is within the four Seas, which makes the Child legitimate; where a Man flieth for Felony, which supposes him guilty, and incurs a Forfeiture of Goods, altho' he be acquitted, &c. Co. Inft. 373. 1 Lill. 156.

Because a Matter appears of it self, it is needless to aver it: Negative Pleas cannot be proved; wherefore it is in vain to aver them. And Prefumption in Law, is always so reasonably grounded, that it bids Defiance to Proof to the contrary.

#### Banimment.

Anishment is a Kind of Civil Death, inflicted on an Offender by Law, for some Crime comNo Man shall be banished his Country but by Authority of Parliament; or in Case of Abjuration for Felony, by the ancient Common Law, &c. And none is to be banished, or in any Sort destroyed, but by Judgment of his Peers, or according to Law, by Magna Charta, 9 H. 3. c. 29. 3 Inst. 115.

Here the Wisdom and Justice of our Law hath provided, that the heavy Punishment of Banishment shall not be imposed but by Judgment of our Representatives in Parliament, by Judgment of our Peers or Equals, or of the Law.

## Bargain and Sale.

A Bargain and Sale is a Deed or Conveyance, whereby the Property of Lands or Goods is, for valuable Confideration, granted from one Man to another. And where any Freehold is to pals, the Deed is to be inrolled in fix Months, &c. But Bargains and Sales of Leases for Years or Goods, need no Inrollment; though they must have Livery and Seisin, which the Bargain and Sale of a Freehold needs not, for it passes the Freehold of the Land without it. 11 Co. Rep. 25. Stat. 27 Hen. 8. c. 16.

If Bargain and Sale be made by one who is not in Possession, nor receives the Rent, it is not good without Livery; and where another Person is in Possession, the Bargainor is to enter and deliver the Deed on the Ground, &c. 1 Lill. Abr. 209.

Inrollment of Deeds of Bargain and Sale is a Publick Act, equal to Livery and Seisin thereon; wherefore it is made by Statute to answer it; and as the Title is upon Record, it is the surest Title

Title. But Possession is required as a Foundation, where the Possession is to be conveyed by Law to another.

#### Bars.

A Bar signifies a Destruction for ever, or taking away for a Time, the Action of a Man that hath Right. It is a Plea in Bar to a personal Action, to say, that the Plaintist did formerly bring an Action for the same Matter, and did recover against the Desendant, and therefore he prays the Judgment of the Court, whether he shall be permitted to proceed in his second Action. Terms de Let 77.

If one be barred by Plea to the Writ, he may have the same Writ again; if by Plea to the Action of the Writ, he may have his Right Action: If the Plea be to the Action itself, and the Plaintiff be barred by Judgment, Verdict, &c. in Personal Actions, it is a Bar for ever; but in Real Actions, he shall have a Writ of an higher Nature,

and try the same Right again. 6 Co. 7.

Recovery or Bar in an Action upon the Case, is a good Bar in an Action of Debt brought upon the same Contract; and Recovery in Debt is a good Bar to an Action on the Case. 4 Rep. 94.

On profecuting Personal Actions, the Plaintiff cannot have Action of a higher Nature, but is to bring Error or Attaint; for these Actions are numerous, and frequently for small Matters: But Action of a higher Nature may be had in Real Actions; because they concern the Inheritance. And as to Action upon the Case being a Bar to Debt, it is reasonable; because in such Action the Plaintiff shall not only recover Damages, but the whole Debt; and one Debt or Duty is not to be twice satisfied.

1Baron

### Baron and feme.

B Aron and Feme are Terms in the Law for Husband and Wife; and Husband and Wife are but one Person in Law.

At Common Law, a Man during the Coverture, could neither in Possession, Reversion, or Remainder, limit an Estate to his Wise; but by Stat. 27 H. 8. a Person may covenant with others to stand seised to the Use of his Wise, or make any other Conveyance to her Use; but he may not covenant with his Wise to stand seised to her Use, for they are one Person in Law. But the a Man may not grant Lands, yet he may devise Lands to his Wise. Co. Lit. 112.

By Marriage with a Woman, the Man is intitled to all her Estate, and seised and possessed thereof in her Right: But then he is liable for her Debts, which likewise become his; tho' after the Death of the Wise, the Husband is not liable. A Wise shall not be sued for the Husband's Debts. Action of Debt lies against the Husband for Goods delivered or sold to the Wise; but the Wise may not make any Contract, without Consent of the Husband, except it be for necessary Apparel, Goods for her Family, &c. 2 Co. Inst. 713. Noy's Max. 19.

A Husband is not to alien the Wife's Lands, but by Fine wherein she joins. And if the Husband conveys away her Land, she may recover it after his Death by Cui in vita. A Wife may not bring any Action for wrong to her, &c. without her Husband, who is to join therein; and when they join in any Action, Damage is to be laid only to the Husband. 1 Co. Inst. 182. But by the Custom of London, a Feme Covert, trading in the

City as a fole Merchant, may fue and be fued as a Feme Sole. And for any Injury done to the Husband, in depriving him of the Conversation and Service of his Wife, he alone may bring an Action: So for taking any Thing from the Wife, as he hath the Property; and for a Promise or Personal Duty to the Wife, Oc. 2 Cro. 538. 1 Lill. 227. 1 Salk. Rep. 114.

A Man must answer for the Trespasses of his Wife; and if a Feme Covert flander any Person, the Husband and Wife must be fued for it. Style's Rep. 113. But for her own Offence, a Wife may be indicted without her Husband, and be fined.

Oc. 2 Roll. Abr. 298.

By Conjunction in Matrimony, Husband and Wife become one Flesh, and one cannot suffer without the other: As they are one Person in Law, a Man may not grant Lands to her, for he cannot do an A& to himself; but a Devise may be made by a Man to his Wife, because the Devise doth not take Effect till after his Death, when they are no longer one Person. A Man is to have the Estate of his Wife, as a Consideration for her Maintenance, and is to be answerable for her Debts, as he is possessed of her Effects, which should farisfy them; but this must be in her Life-time, for both are to be fued, and after her Death his Relation to her ceafes. Goods for a Man's Family the Wife may contract for, because they are prefumed to come to the Use of the Hufband. By Fine only, which is an Act upon Record, a married Woman may convey away her own Lands; and therefore the must join therein: And Wrongs and Injuries to the Wife are Wrongs to the Husband, so that they must join in Actions; but for particular Injuries, and where the Hufband hath the Property, it is reasonable it should be otherwise.

A married Woman cannot be produced as an Evidence for or against her Husband, unless it be in Criminal Cases; such as Treason, &c. wherein her Evidence shall be admitted against him. Co. Litt.

This is likewise from their being one Person in Law, and for that they would be Witnesses in their own Cause; but in Treason she may be a Witness against him, for the Safety of the State, which is always to preferred.

A Husband hath Power over his Wife's Person, and by the Common Law may give her reasonable Chastisement and Correction. Dalt. 284.

As the Husband is the Head of the Wife, and she owes him Obedience.

### Baffards.

A Bastard is one that is born out of Marriage:
And he shall not inherit, or be Heir to any
one; and he can have no Heir but of his own Bo-

dy. 1 Inft. 243.

If a Child be begotten on a Woman, by a Man that marries her after the Birth of the Child, yet it is in Judgment of Law a Bastard. If a Man or Woman marry a second Wise or Husband, the first being living, and have Issue by such second Wise or Husband, the Issue is a Bastard. But if a Man takes a Wise, who is great with Child by another, who was not her Husband, it shall be adjudged his Child: And if a Woman elope with a Stranger, and hath a Child by him, her Husband being infra quatuor Maria, and not incapable of C 2

getting Children, this Child shall be legitimate. 1 Inst. 244. 1 Roll. Abr. 358.

Before the Statute 2 & 3 Ed. 6. cap. 21. one was accounted a Bastard, Quia silius Sacerdotis.

Where a Person is born out of Marriage, the Father is not known by the Law; and consequently he shall not have the Capacities by Law, as a Child of one that is. As he is no Man's Issue, he is no Man's Heir; and he can have no Heir but of his own Body, because of the Uncertainty, who is related to him. Marriage after Birth will not legitimate a Child, for the Birth was unlawful. And Children begot in second Marriage (the first subsisting) are unlawful, as the Marriage is such. But all Children begotten in lawful Marriage, are suppos'd lawful, because of the Marriage Vows, and the strong Intendment of the Husband's conversing with his Wife.

### Blood corrupted.

IN High Treason, the Offender shall forseit to the King all his Lands, Tenements and Hereditaments, which he had at the Time of the Treason committed, or afterwards, the Right of all others saved; and all his Goods and Chattels, Cc. And his Blood shall be corrupted by becoming Base as to his Birth, and his Children shall not inherit to him, or any of his Ancestors. But collateral Blood may inherit, though the lineal Blood cannot. 1 Inst. 8 3 Inst. 12.

The Blood cannot be restored but by Act of Parliament; or reversing the Attainder by Writ of Error, with the King's Consent. The King may restore the Party or his Heirs, as to his Lands, and the Blood as to all Issue begotten after the At-

tainder; but not before. 3 Inft. 240.

Restitutions by Parliament are some of Blood on y; some of Blood, Honour, Inheritance, &c.

The Sons of Traitors are barred from the Inheritance of their Ancestors, that their Fathers Infamy may always attend them, and deter them from those Crimes to which they are presumed to be prone by Nature. And when a Man does an A& unworthily, which debases himself, his Blood, the principal Part of him is debased; and where the large Channel of a River is foul, the small Streams from it, must of course be corrupted.

### Bzibery.

BRibery is a high Offence, where a Person in a judicial Place, takes any Gift, Reward or Brocage, for doing his Office, but of the King only.

But taken largely it signifies the receiving or offering any undue Reward, to or by any Person in the Administration of Publick Justice, whether Judge, Officer, Oc. to act contrary to his Duty. And sometimes it signifies the taking or giving a

Reward for a Publick Office. 3 Inft. 149.

The Punishment of Bribery in Judicial or Ministeral Officers, is Fine and Imprisonment. And Judges Servants may be punished for receiving Bribes. By a late Act, Bribery in the Election of Members of Parliament, is severely punished; the Electors taking Money, &c. incurring a Penalty of 500 l. and Disability to hold any Office or Franchise, &c. Stat. 2 Geo. 2.

A Bribe of Money, though small, the Fault is great; for where Bribery takes Place, Right and Justice are perverted. And nothing can bring about general Ruin more effectually than Bribery and G 3

Corruption; for which Reason the Laws of England, on this Head, have been thought too mild and indulgent.

### Burglary.

Burglary is where a Person, in the Night, Breaketh and Entereth into the Mansion-House of another, to the Intent to commit some Felony there, whether the Felonious Intent be executed or not.

If a Servant in the Night-time draws the Latch of his Master's Chamber-Door, and enters it with an Intention to Rob or Murder him, 'tis Burglary; and if a Servant in a House open the Door or Window, and the Robber enters and steals, it is Burglary in the Stranger, and Robbery in the Servant. If Thieves come with Intent to Rob a Person, and finding the Door lock'd, pretend they come to speak with him, whereupon a Servant opens the Door in the Night, and they come in and rob the House, this is Burglary, without an actual Breaking of such House. H. P. C. 80. 3 Inst. 64. Kel. 62.

Where a Person, by the Help of a Key, enters a House, or comes down a Chimney in the Night-time, to rob, they are Barglary: And the setting a Foot over a Threshold, is an Entry, where a Door is broke open. 3 Inft. 64. Kel. 42.

If a Person be within the House, and steal Goods in the Night, and then open the House on the Inside to carry them away, this is Burglary.

3 Inft. 64.

Every Man is entitled to Safety in his own Dwelling, it being his only Place of Trust and Safety, and therefore the least Violation of his House

is highly Criminal: Besides, as Burglary is perpetrated in the Night, the Surprise and Terror it gives to the Persons robbed, adds to the Crime. And all Entries into Houses are unlawful, where the Intention is unlawful. The opening of Doors for a dishonest Purpose, is Criminal in the Eye of the Law; because no Purpose dishonest is justifiable by Law.

### Carriers.

IF a Carrier hath Goods delivered to him to carry to a certain Place, and he imbezils them, he is not Guilty of Felony; but if the Carrier does not carry the Goods to the Place agreed, or does, and then takes them, with an Intention of stealing them; or if he opens the Pack, and takes away Part of the Goods he is charged with, he is, in either of these Cases, Guilty of Felony. 3 Inst. 107.

A Common Carrier, having the Charge and Carriage of Goods, is answerable for the same, or the Value, to the Owner. Co. Lit. 78. And if a Man delivers a Box to a Carrier, wherein is a large Sum of Money, and tells him it is fill'd with such and such Goods, if the Carrier is robb'd he shall pay the whole; unless there be a Special Ac-

ceptance. 1 Roll. 338.

But an Acceptance, provided there is no Charge of Money, &c. may excuse the Carrier.

By the Delivery of Goods to a Carrier the hath the Possession of them lawfully, so that a bare Imbezilment is not Felony; but there must be an Intent of Thest, manifested in some Act, to make this Crime. As a Carrier hath the whole Charge of Goods, its but reasonable he should

### 24 The Student's Companion :

be answerable; and for that otherwise seigned Robberies and Accidents might be pleaded: And he implicitly undertaketh the safe Delivery of the Goods for his Hire.

### Chance-medley.

Chance-medley fignifies the casual Killing of a Man, not without the Killer's Fault, though without evil Intent: And is where a Person is doing a lawful Act, and another is killed by Chance

thereby.

If a Person casts a Stone in a Highway, which accidentally hits a Man whereof he dies; or shoots an Arrow, &c. and a Person that passeth by is killed therewith; or if a Workman in throwing down Rubbish from a House, after Warning to sake Care, kills a Man; or a Schoolmaster in correcting his Scholar, a Master his Servant, or an Officer in whipping a Criminal, in a reasonable Manner, happens to occasion his Death, it is Chancemedley and Misadventure. 3 Co. Inst. 56.

And in Chance-medley the Offender is liable to Forfeiture of Goods; but he hath a Pardon of

Course. Stat. 6 Ed. 1.

Accidents that arise from lawful Actions, though so fatal as extending to Death, are in a great Measure excused by our Law, which restrains no Actions that are lawful, be the Consequence happening thereon what it will: But where there is a Loss of a Subject, it is reasonable some Penalty should be incurred by the Aggressor, to make Men the more cautious and circumspect in those lawful Actions which may possibly endanger others.

Chattely,

### Chattels.

immoveable; except such as are in Nature of Freehold. They are either Real or Personal; Real, such as appertain not to the Person, but concern the Reality, Lands and Tenements, &c. as a Box with Charters of Lands, a Lease or Rent for a Term of Years, Corn cut and growing, Grass cut and severed, Trees cut, &c. Chattels Personal are called so, because they belong immediately to the Person; as a Horse, Cattle, Money, Plate, Houshold-Goods, &c. But Land, Trees growing, Deeds concerning Freehold, are not comprehended under the Word Chattels: Nor is Money in Strictness to be accounted Goods or Chattels. I Inst. 118. Kitch 32.

All Goods and Chattels the Law appoints to the

Executors of a Person deceased.

There is a Diversity of Goods and Chattels; but Deeds are not properly such; nor is Money strictly so, because it is not of it felf valuable, tho it purchases every Thing in Life. All Chattels belong to the Executor, and not to the Heir, because the Executor is liable for the Testator's Debts; and Goods and Chattels are not of so high a Nature as Land, which belongs to the Heir.

### Chofe in Action.

CHOSE in Action is a Thing incorporeal, and only a Right: And when a Man hath Caufe of, or may bring an Action for some Duty, as for Debt upon Bond, or for Rent, on Covenant, Tres-

pals for Goods taken away, &c. as they are Things whereof a Person is not possessed, but is put to his Action for Recovery of them, they are therefore called Choses in Action. And a Chose in Action cannot be granted or transferred over to another; nor can it be a Satisfaction. Gro. Jac. 170, 371. 1 Eill. 264.

Meer Rights and Things in Action, are not transferable over; not only because the Persons leaving them want the Possession, and by Reason of the Uncertainty as to their Recovery, but because the granting them over to others might occasion Maintenance and Oppression.

## Shadara to 191 Claims.

Our Land. I recessor

CLAIM is a Challenge of Interest in any Thing that is in the Possession of another, or which is out of a Man's own.

Regularly continual Claim, made and repeated yearly, so as to be within a Year and Day before the Death of him that hath the Land, &c. cannot lawfully be made of Lands, but where he that makes the Claim hath present Right or Title to enter; and yet in some Cases, where a Man is without any other Remedy, (as in Case of Reversions, &c.) a Claim may be made by him that hath Right, and cannot enter to take the Profits. Co. Lit. 250.

When a Man for Fear of Death, or some Corporal Injury, dares not make an actual Entry into Land, he may approach as near thereunto as he dares, and claim the Land; and this Claim doth west the Possession and Seisin in him, as if he had made an actual Entry into the same. 1 Inst. 53.

But every Doubt or Fear is not sufficient; for it must concern the Safety of a Man's Person, and not of his House, or Goods, &c. And it must not be a vain Fear. The Party making a Claim, may thereby avoid Discents of Lands, Disseisins, &c. And save his Title, which otherwise would be lost. I Co. Inst. 250.

Right is the Foundation of Interest, and therefore Claim of Lands is not generally good, but where there is a Right of Entry; but in extraordinary Cases, when a Man hath no other Means to have Justice done him, he may vary from this Rule. Danger to a Man's Person, in making of Claims, is greater than to his Goods: The Fear of burning Houses, or taking away Goods, are not sufficient Causes to forbear an Entry and Claim; because the same may be recovered again, or Damages to the Value, which a Man's Life, if loft cannot. But the Fear must be fuch as a Constant Man would dread; as if the Adverse Party lie in wait with Weapons, &c. Claim made to Land, which a Man dares not enter, amounts to an Entry in Law; because it is doing as much as a Man can do with Safety, and the Impediment to it is unlawful.

There is a Time limited for Claims, &c. of Titles to Land. As Seisin in a Writ of Right shall be within fixty Years before the Teste of the same Writ. Writs of Formedon are to be brought within twenty Years after Title accrued; and Entry to be made in the same Time. And where a Fine passes of Lands, those as are not Parties or Privies, are to Enter and Claim within five Years, or be barred: And the like Time have Insants after they are of Age, Madmen after cured, Feme Coverts after Death of their Husbands, Prisoners after Inlargement, &c. Stat. 1 R. 2. 4 H. 7. &c.

It is fitting a Time should be limited for Claims, if it were only for the better Clearing up of Rights; and that this Time should be shorter as to Fines, than in Common Cases. Infants and Lunaticks, being (one thro' Want of Years, and the other of Memory) void of Discretion; and Feme Coverts and Prisoners, by Reason of their Subjection to others, incapable of acting, 'tis but reasonable their Time limited should extend till those Impediments are removed.

#### Coin.

COIN is a Word collective, containing in it all Manner of Species of our Money. And this is one of the Royal Prerogatives belonging to every Sovereign Prince, that he alone in his own Dominions may order the Coinage of Money: But the Coin of one King is not current in the Kingdom of another, unless it be at a Loss; though our King may make any Foreign Coin lawful Money of England by his Royal Proclamation. Terms de Ley 136. Crompt. Jur. 220.

Coins of Gold and Silver are to pass notwithstanding some of them are cracked or worn; but not if they are clipt. 19 H. 7. c. 5. Any Person may break or deface Pieces of Silver Money, suspected to be counterfeit, or diminish'd otherwise than by Wearing; but if they appear to be good Coin, he shall stand to the Loss, Gc. Stat. 9

10 W. 3. c. 21.

In the Receiving of Money, after a Person has accepted it in Payment from another, and put it in his Purse, he shall not then take Exception to it as counterfeit Coin, though he presently reviews the same.

fame. A Payment of a Sum of Money in Farthings, is no good Payment. 2 Co. Inft. 577.

By Act of Parliament, or the King's Proclamation, French, Spanish, or other Coin may be made lawful and current; and not otherwise, any more than a Foreign Person may be naturalized, or made Denizen without such Authority. The Wearing of Coin is no Objection thereto, because it is made for Circulation, which must of Consequence wear it: But counterfeit Coin is unlawful, and may be destroy'd. The Time for a Person to except to Money, is before it is put in his Purse; atterwards it is too late, for there may be Fraud and Deceit. Farthings seem not to be lawful Coin, only Gold and Silver.

### Conditions of Bonds, &c.

A Condition of a Bond is for the Payment of Money, or doing some other Act, and is De-clarative of the Thing to be paid and perform'd.

These Conditions must be to do Things lawful and possible; for when the Matter or Thing to be done by the Condition, is unlawful or impossible, the Condition is void. If a Thing be possible at the Time of making the Bond, and afterwards becomes impossible by the Act of God, of the Law, or the Obligee, it is become void. 10 Rep. 120. Dyer 51.

Where no Time is appointed in the Condition of a Bond, for Payment of Money, it is a Debt presently; but sometimes the Judges have made a Discretionary Appointment of Time suiting Convenience, with Regard to Distance of Place, and the Time wherein the Thing may be performed. If a Condition be to make Payment on the 30th

of February, the Money shall be presently paid.

I Inft. 206.

If an Act be to be done, by an Obligation, at a certain Place; as to go to Rome, &c. and the Obligor is to do the fole Act, without Limitation of Time, he hath Time during Life to perform it; but where the Concurrence of the Obligee is necessary with the Obligor, it may be hastened by Request. When no Place is mentioned for Payment of Money in a Bond, the Obligor is to find out the Person of the Obligee, wherever he is, if he be in England, and Tender the Money. I Roll. Abr. 437. List. Sell. 340.

In Case an Obligation be made for Payment of Money at several Days, the Obligation is not forfeited, nor can the Obligor be sued, until all the

Days are past. Co. Litt. 292.

Things unlawful and impossible to be done, are in their Nature void; for no Law can uphold any Thing unlawful, nor compel any one to do what is impossible. The Appointing no Time for Payment of Money, makes it an immediate Debt, the Debt being acknowledged by the Bond; and if there be no such Day as the Day appointed, it is the same Thing; for some Time must be observed. It is reasonable a Man should have Time for a corporal Duty, which may be hinder'd by Sicknels, &c. The Obligor is to find out the Obligee, where no Place is mentioned; because to him the Payment is to be made. An Obligation for Payment at several Days, is not forfeit till all the Days are past, for the Obligation is to be recover'd. which is not due till the last Day; and a Bond is entire, and cannot be fued above once.

If a Feoffment be made upon Condition, that if the Feoffer pay a certain Sum of Money to the Feoffee, then it shall be lawful for the Feoffer, Oc. to enter; here no Time being appointed, the Feoffer hath Time during Life; so that there is a Diversity between a Condition of an Obligation, and a Condition of a Feoffment. But if one make a Feoffment in Fee upon Condition, that the Feoffee shall infeoff a Stranger, and no Time is limited, in this Case the Feoffee shall not have Time, during Life, to make the Feoffment. Co. Lit. 208.

A Condition of a Bond is more Strict and Penal than a Condition in any other Deed: But in a Feoffment, where a Stranger is to be enfeoffed, it must be done in convenient Time, that the Feoffer maynot take the Profits to his own Use.

# Considerations.

Onsideration is the material Cause of all Contracts, without which no Contract binds. It is either Expressed or Implied; Expressed, as if a Man bargain to give five Pounds for a Horse; Implied, when the Law inforces a Consideration, as if a Man come into an Inn, and there stay some Time taking Meat and Lodging for himself and his Horse, the Law presumes he intends to pay for both, tho there be no express Contract for it; and if he Discharge not the House, the Host may stay his Horse. Co. Litt. Dyer 30.

A Bargain and Sale can never be without a valuable Consideration: If Lands are granted to a Man by Deed, and no Consideration is expressed, it shall be intended by Law in Trust for the Grantor. Where a Man makes a Feossment in Fee, without valuable Consideration, to divers Uses, so much of the Use as he disposeth not, is in him. If a Feossment be made to superstitious Uses, the Uses are void, but the Feossment remains good;

and the Feoffees shall fland feifed to the Use of the Feoffor and his Heirs: But if the Feoffor reserve I d. Rent, or receives from the Feoffees I d. Confideration, the Feoffees shall be seised to the Use of themselves and their Heirs. 1 Co. Rep. 176.

2 Co. Rep. 24.

A Use cannot be raised by Bargain and Sale upon a general Confideration, as for divers good Confiderations, &c. for it appears not that the Bargainer had quid pro quo. But natural Love, Affection, Blood, Oc. are good Considerations, to raise Uses to a Man's Family. 1 Co. 176. 7 Rep. 40.

There is a Quid pro quo in Contracts, and a Sale may not be without a Confideration; because a Recompence is to be made. Without a Recompence and Confideration, it cannot be intended a Man would part with his Land to a Stranger: Therefore, where there is no such Recompence or Confideration, the Deed shall be to a Man's own Use. Superfittious Uses are destroyed by Stat. 23 H. 8. And nothing operates upon a general Confideration in a Bargain and Sale; but Natural Love, Affection, &c. are good Confiderations to raise Uses to a Man's Family; because a Man is bound by Nature to provide for it; and what he does, is not by Way of Sale, but Gift.

### Contracts.

Contract is a Covenant or Agreement between

two, upon a lawful Consideration.

Every Contract Executory, imports in itself an Assumpfit; for when one agrees to pay Money, or deliver any Thing, he doth thereby assume and promile to pay or deliver it; and therefore, when one fells any Goods to another, and agrees to deliver them at a Day to come, and the other, in Conside-

ration

ration thereof, agrees to pay so much Money at such a Day; in this Case both the Parties may have an Action of Debt, or Action upon the Case on Af-

Sumpfir. 4 Rep. 94. Dyer 30, 293.

If a Man affirms a Thing fold is of such a Value, it will bear no Action; but if he actually warrants it, it will bear an Action. If one warrants any Thing sold after the Time of the Sale, it is not good; for it must be made at the Time of the Sale to be Binding, being Part of the Contract. I Roll. Abr. 97.

Where a Horse, &c. is sold, the Property by the Contract is in the Buyer immediately; but the Seller may detain the Horse till he is paid his Money; and yet he cannot prosecute for the Money till the Horse is deliver & to the Buyer, unless it be in Case of the Death of the Horse, between the Contract

and Delivery. Noy's Max. 88.

Part of Goods fold is to be received; some Thing paid or given in Earnest, or some Memorandum to be in Writing, where Contracts are made for the Sale of Goods of 10 l. Value. 29 Car. 2. c. 3.

Contracts and Promisses made without Consideration, are called Nude Contracts, Oc. and void

in Law.

A mutual Executory Agreement imports as well a reciprocal Action upon the Case, as an Action of Debt; for it includes a Promise, and there is something due on both Sides: And Warranty gives Confidence to the Buyer in the Buying of Goods. Things sold must first be deliver'd before Action is brought, because the Delivery alters the Property, and compleats the Contract on the Side of the Seller; till which the Buyer may not be compelled to perform his Part. In Bargains Part of the Goods is to be received, or some Earnest given, to bind the Contract; for the Receiving Part of the Goods by the Buyer, gives him as it were Possession of, and obliges him to the Whole,

### 34 The Student's Companion:

as Acceptance of Part of the Money by the Seller, is a Witness of the Whole. A naked Promise, &c. without any Consideration why it should be made, the Law supposes some Error in making it, so as not to be Binding.

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Ontribution is where every one pays his Share or Part to any Thing: And is in divers Cases. One Parcener performing the whole Suit of Court for the rest, shall have Contribution against them; and one Heir have Contribution against another Heir, in equal Degree: Also one Purchaser shall have Contribution against another. One Conusor in a Statute being sued, may have Contribution against others; so where Execution is sued against the Heir only. A Tenant in Common shall have Contribution against another for Repairs, &c. and where Damages are recovered against one or a few Persons in Action against the Hundred, for Robberry committed, the rest of the Inhabitants shall make Contribution: 3 Co. Rep. 12. Stat. 27 Eliz. c. 13.

Unless there be an equal Charge upon Lands and Persons, where several are bound to certain Acts, equal Justice would not be done; and 'tis reasonable, that as well all Lands as Persons, should bear their own just and perpertionate Burdens.

# Copyhold Estates.

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Opyhold is a Tenure, for which the Tenant hath nothing to shew but the Copy of the Rolls made out by the Steward of the Manor. For as the Steward enrols, and makes the Remembrances of all other Things done in the Lord's Court, so

he does also of such Tenants as are admitted in the Court, to any Lands or Tenements belonging to the Manor; and the Transcript of this is called the Court-Roll, the Copy whereof the Tenant keeps as the only Evidence of his Title to his Estate. 4 Co. 25.

A Copyhold is called a Base Tenure, the Estate being held at the Will of the Lord; but the a Copyholder hath (in Judgment of Law) but an Estate at Will, yet Custom hath so established and fixed his Estate, that it is Descendable, and his Heirs shall inherit it. And therefore his Estate is not meerly ad voluntatem Domini, but ad voluntatem Domini secundum consuetudinem Manerii; so as the Custom of the Manor is the very Life and Soul of Copyhold Estates. 4 Rep. 31. Comp. Cop. Sect. 36, 39.

There is a Copyhold of Inheritance in Fee, and Copyhold for Lives; but the Tenure for Life is most usual at this Day. A Copyhold Estate may not be transferred otherwise than by Surrender. 1 Inst. 58.

Copyhold Tenure was anciently Tenure in Villenage; and these Tenants, without Custom, by the Nature of their Tenures, are subject to the Will of the Lord, as they are likewise if they break their Customs, which incurs a Forseiture of them. But by Right of Custom, a Copyhold is Inheritable, and the Copyholder shall hold his Estate as he who hath a Freehold at Common Law; for Consuctudo in this Case est altera Lex, and being an Usage Time out of Mind, is sufficient to create an Estate of Inheritance.

## Copposations.

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A Corporation is a Body Politick, or Incorporate, with Capacity to take and grant, Ga. And a Body Politick is a Creature of the King, created by Letters Patent.

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And Corporations are Sole or Aggregate: Sole, when in one fingle Person, as the King, a Bishop, &c. Aggregate, of many Persons, as Mayor and Commonalty, Dean and Chapter, &c. And there may be a Corporation without a Head; but when there is a Head, and he dies, nothing may be done in the Vacancy. 10 Co. Rep. 30. When a Corporation is duly created, all Incidents as to Purchase and Grant, sue and be sued, &c. are tacitly annex'd to it: And Corporations may make By-laws, for the Good Government of the Body Incorporate; also may have Power to Enfranchise, or Disfranchise a Member, &c. But one wrongfully Disfranchis'd, shall have Remedy by Mandamus. 4 Rep. 77.

If a Corporation neglect to choose such Officers as they ought to elect by their Charter, or if they make a salse Election, not warranted by Charter, or for any Misuser, &c. it is a Forseiture of their Corporation. Hill. 21 Car. B. R. If a Corporation hath Commencement by Charter, and it is expressed therein, that the Choice of their Mayor, Bailiss, and other Officers, shall be by the Commonalty; if by a long Usage they have chosen them by a select Number of the Principal of the Commonalty, or of the Burgesses, although no Constitution can be shewed to warrant such Election, yet such Election hath been adjudged good in Law. 4 Co. Rep. 77.

Attachment doth not lie against a Corporation; but a Corporation may be sued, where bound by their Common Seal. And an Obligation being sealed with the Common Seal of a Corporation, if the Mayor signs it, and the Corporation is afterwards dissolved, the Mayor is suable. 1 Lev. 237. Raym. 152.

Grants of Corporations are to be by Deed under their Seal: They cannot sue, or appear in Person. fon, but by Attorney; nor can they commit Treafon, or be outlawed, &c. or be Executors, &c. 10 Rep. 32.

A Corporation, or Body Politick, is fo called from the Members being made into a Body; and is termed a Creature of the King, because the King is the Head of the Common Wealth, which is one great Corporation, in Respect to him, and all other Corporations are but as Limbs of the Greater Body. There are usually granted in Charters of Corporations, divers Franchises; as Felons Goods, Waifs, Effrays, Courts, and Cognizance of Pleas, Affife of Bread, &c. befides what is incident to them by Law: And as to the Choice of Officers, & their Charters imply Conditions in Law to be performed, and by their not performing them, their Charter is forfeited. Blections made by long Usage, are presumed to be made by Common Affent, which makes them lawful. Attachment doth not lie against a Corporation; nor may a Corporation be imprison'd, outlawed, &c. because they act in a Political Car pacity, and are different from private Men.

The Acts of Corporations are made by the Confent of the major Part of the Corporation, which shall be binding to the rest.

This is because it is the only Method of determining the Acts of Many; and where the major Part is, there, by the Law, is the Whole.

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OSTS are expensa Litis, recovered by the Plaintiff, together with his Damages, when the Cause is determined in his Favour: Also the Defendant shall have Costs, where the Plaintiff is nonsuited, or a Verdict is for him. And not only D 2

Nonfuits, and Verdicts, but putting off Trials, in-

sufficient Pleas. &c. are liable to Costs.

These Costs are given by Statute; and allow'd in many Actions, and Attachment lies where refused Payment: But no Costs are given against the King; nor against Executors or Administrators, &c. Com. Law Com. plac'd 135.

A Defendant not complying to fatisfy a just Debt without Compulsion of Law, or a Plaintiff profecuting a Defendant where no Debt is due, &c. for the Trouble and Vexation on either Side, our Law allows Costs: And it is highly Rational where any Persons shall bring any unjust Expences upon others; that they who occasioned should defray

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or may a Corporation be impriford,

Officer is what is established by long Use, and the Consent of our Ancestors.

When a reasonable Act once done, hath been found beneficial to the People, then have they used and repeated it often; and by the Reiteration of the same it has become a Custom, which being practised Time out of Mind, without Interruption, for the Quiet, and by the Approbation of the People, obtained the Force of a Law. Brack lib. 1. cap. 3. 1 Roll. Abr. 565.

All Customs are to have a lawful Beginning; to be reasonable; to be certain; and to have Continuance, without Interruption, Time out of Mind; or they shall not have the Vigour of Laws, to be

Binding to the People. Dav. Rep. 32.

General Customs are used throughout England, which is the Common Law: And particular Customs are such as are used in some certain City, Town,

Town, &c. General Customs, and also Maxims of Law are determined by the Judges; but particular Customs are triable by a Jury of twelve Men. 1 Inst. 110.

Common Use is Custom, which is presumed to have a lawful Beginning, or it cannot be commonly used. Custom against Reason is rather an Usurpation than Custom; and the Common Law, which is general Custom, being grounded upon Reason, a particular Custom unreasonable will not be allowed. There must be Certainty in Customs, for Incertainties are esteemed for nothing in the Law; and 'tis fitting they should have Continuance to be Binding, which is the strongest Proof of their being Reasonable, and this may not be if there be any Interruption. The Judges only can best determine general Customs, which are the Common Law of the Land.

### Damages.

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D'Amage signifies generally any Hurt or Hinderance that a Man receives in his Estate; but particularly what the Jury are to inquire of, when an Action passeth for the Plaintiff: And in some extraordinary Cases, double, treble Damages, &c. are given.

There is a Diversity betwixt Personal Actions and Real Actions, wherein Damages are to be recovered; for in Personal Actions, the Plaintiff shall count for Damages; but in Real Actions, the Demandant shall never count for Damages; but shall have them affessed by Writ of Inquiry. 10 Co. Rep. 117.

In Action on the Case, the Jury may find less Damages than the Plaintiff lays in his Declaration;

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but they cannot find more than is laid in the Declaration; if they do, it is Error. But if a Declaration be in Case, Oc. ad damnum 20 1. and the Jury find 20 1. Damages, and 10 1. is taxed for Coffs by the Master, making in the Whole 30 l. it will be good enough. Mich. 22 Car. B. R. 1 Lill. 390.

When a Judgment is given by Default in an Action of Debt, then the Court doth affels the Damages, and not the Jury. Unless a Jury give 40 s. Damages, the Plaintiff shall generally have no more Costs than Damages, in Personal Actions, Actions

of Trespals, Oc. 21 7ac. 1.

Where a Damage is, there ought to be a Recompence. In Personal Actions, the Plaintiff may know in certain what Damage he hath suffered before the Writ purchased, and those only he shall recover; but in Real Actions, they are uncertain, and he shall recover Damages, hanging the Writ, wherefore he shall not Count for them. In Action upon the Case, the Law presumes the Plaintiff will not lay less Damage than he hath sustained; for which Reason more Damage than he lays is not to be found; but Costs are given in Respect of the Plaintist's Expences in his Suit. Where a Defendant fuffers Judgment by Default, he in Effect confesses the Damages laid against him, which the Court shall affels, there being no Jury for Trial.

The Court may increase Damages found by the Jury upon a Writ of Enquiry, in Action of Affault, Battery, Wounding, Oc.

In these Cases the Court may as well judge of Damages, as the Jury; because there is nothing but a corporal Injury, which of all others is generally the most apparent.

### Debts.

A Ction of Debt lies where a Man owes another a Sum of Money, by Obligation, or Bar-

gain for any Thing fold him.

An Indebitatus generally is not good to create a Debt, but there must be something else made appear to the Court to make a Debt to be due to the Party that brings an Action of Debt, or else the Action will not lie; for he must shew for what the Desendant was indebted particularly. I Lill.

But in some Cases an Action of Debt will lie, the there be no Contract, &c. between the Party that brings the Action, and him against whom

the Action is brought. Ibid.

A Man owes a Sum of Money to another, who hath his Note under Hand, without Seal, Action of Debt on Mutuatus lies; but the Defendant may wage his Law: On Action of the Case, upon Promise of Payment, it is otherwise. Comp. Attorn. 6.

In Action of Debt on Bond, &c. the Defendant may plead Payment before Action brought; and pending the Action, he may bring in Principal, Interest and Costs, and the Court will give Judgment to discharge him. Stat. 4 & 5 Ann.

The particular Cause of Debts, as for Money Lent, Goods sold, &c. must be shewn, that the Court may judge whether the Action be well brought, and the Debt may be lawfully sued for. As to Actions of Debt without Contract, there may be a Duty created by Law, for which Action will lie. When a Debt and Costs are satisfied, which is the End and Design of the Prosecution, 'tis reasonable the Desendant should be discharged.

Deceits.

### Deceits.

there is a Writ of Deceit for not performing a Bargain, or not selling good Commodities, &c. as well as Action on the Case. And many Kinds of Frauds and Deceits are provided against by Statute, relating to Artificers, Bakers, Brewers, Victuallers, false Weights and Measures, &c. which are liable to Penalties and Punishments in Proportion to the Offence. I Inst. 357. 11 H. 7. c. 4.

All Practices of Defrauding, or endeavouring to Defraud or Deceive another of his Right, are punishable by Fine and Imprisonment; and if for

Cheating, by Pillory, &c.

To guard against Deceit, Corruption and Violence, in the Actions of Men, most of our Laws have been necessarily enacted; and because Deceits are attended with Damage, and the most pernicious Consequences, they are severely punished by Law.

#### -nelgel all demands. in adam

Demand fignifies a Calling upon a Man for any Thing due, for which certain Times

are limited by Statute.

A Debt is to be demanded and profecuted within fix Years after due, or the Statute of Limitations, 21 Jac. 1. c. 16. may be pleaded, and the Debt avoided. The bringing an Action of Debt, for Money due upon an Obligation; and the taking of a Distress for Rent, are a good Demand in Law of the Debt and of the Rent. Trin. 22 Car. 2. B. R. If a Rent be reserved to be paid on certain Feasts, with Condition, that if it happen the Rent be behind by the Space of a Week, &c. after any of the Days of Payment, the Lessor to enter; in this Case, the Lessor need not Demand it on the Feast-Day, but some convenient Time before the last Day of the Week, &c. And such convenient Time is before the Sun-setting of the last Day of Paymeut: Also Place is to be observed, for if there be a House upon the Land, the Rent must be demanded at the Fore-Door thereof. Co. Lit 202.

Rent is to be demanded on the Land, where no Place for Payment is named, and unless it be referved to be paid elsewhere. And Demand at any Time after due, shall be sufficient to warrant a Distress; but for Re-entry, the Day of Payment must be observed, and the Party demanding must continue on the Land, &c. till it is dark. Dyer 51. Plowd. 70.

Demand is to be made in Time, or a Man's Right may be loft. Bringing an Action is a Demand, because the Money is demanded in the Writ; and a Distress is a tacit Demand of the Rent, being taken for the Rent that is due. Demand must be made at the most notorious Place of the House, Land, &c. that the Lessee may be sure to have Notice: And it is to be on the Land, because the Rent is there of Right payable, and it is paid for the Land. Demand after the Day due, shall be good for a Distress; for that may be at any Time taken: But for Re-entry, it must be exactly on the Day, because on Non-payment you begin a legal Prosecution, which is beyond Distress, to eject the Lessee being allowed the whole Day for Payment.

### Beeds. delle

A Deed is an Instrument in Writing, compre-A hending a Contract or Bargain between Party

and Party.

Deeds are indented confifting of two, three or more Parts, whereof the Grantor, &c. hath one, the Grantee another Part, and some other Perfon a third, &c. by Indenture between them; or are Poll, viz. fingle, and but of one Part, which the Grantee hath. And Deeds have feveral formal Parts, viz. the Date, when made: the Premisses, setting forth the Names of the Parties, and Things granted, &c. the Habendum, naming the Certainty of the Estate; the Reddendum, reserving Rent, &c. Conditions and Covenants, expressing the Terms of holding; and Warranty, for fecuring the Estate to the Grantee, &c. 1 Co. Inft. 6. 47, 365. Plowd. 152.

Such Construction is to be made of a Deed, that it may agree with the Intent of the Parties : if their Intent do not contradict the Law, and may be known by the Deed: And if all the Parts of a Deed may by Law stand together, no one Part of it shall be interpreted to make it void. Deeds are to be expounded fo that all Parts shall stand; where there are two Sentences in a Deed, the fecond may explain the first, and both stand together; but if the second Part contradicts the first, fuch second Clause shall be void. The first Deed stands in Force: And Deeds shall never be void, where the Words may be employed to some In-

tent. 1 Inft. 217, 313. Plowd. 160.

A Deed, Contract, Obligation, &c. made in Writing cannot be discharged but by some Deed in Writing. And Deeds of Gift, &c. fraudulently made, with Intent to defeat Creditors of their Debts; Grants and Conveyances of Lands, to Defraud any Purchaser for valuable Consideration; and of Lands, with Clause of Revocation, as to Purchasers, &c. are declared void by Stat. 13 &c. 27 Eliz.

If a Man keeps Possession of Lands, after he hath by Deed assigned his Lease, the Assignment

shall be adjudg'd Fraudulent. F. N. B. 98.

The Intention of Parties in Deeds of Indenture, &c. is much favoured by the Law; and what is the Use of Deeds, but to manifest the Acts and Intentions of the Parties? If a Deed be good in the Whole, it shall not be judged, that a Part shall viriate it; for that would be a Comment its deftroy the Text. Deeds, &c. are to be difcharged and transferred by Deeds, by Reason every Contract ought to be diffolved by the fame Means and Matter of as high a Nature, as that of the Contract. Frudulent Deeds are void in Law, because all Fraud is unlawful: And if a Man keeps in Pollellion of Lands he has made over to another, there is a strong Presumption he is still the Owner, and not the Assignee, who hath not the Possession.

Fasse Lawn, or salse English will not make a Deed void, where the Intention of the Parties may appear; but Rasure, or Interlineation in a Deed, in a Part material, will make the same void, unless there be some Notice of it, testifying its being done before Signing and Sealing. 1 Roll. Rep. 40.

If this were not Law, a Deed might be altered in a few Words, so as to contain quite another Meaning to what was agreed on by the Parties; and when once altered, without their Consent, it is not the same to be their Deed.

Debaffabitg.

### Debastabits.

Devastavit is the Wasting of Goods of the Testator or Intestate, by Executors or Administrators.

And an Executor not paying Debts upon Judgments and Statutes, before Debts on Bond, and Simple Contract; or not paying all Debts, before Legacies; Keeping the Goods of the Deceased in his Hands, or Selling them, and not paying off Debts, Oc. Selling the Teltator's Goods at an Under-value; or doing any Thing by Negligence, or Fraud, whereby the Estate of the Deceased is misemploy'd, are a Devastavit or Waste; and he shall be charged for so much de bonis propriis as if for his own Debt. 8 Rep. 133. 1 Roll. Abr. 929.

But the Fraud or Negligence of one Executor, is

not chargeable on the Reft.

Executors, &c. not observing the Law which directs them in the Management of the Estate of the Teffator, and who waste or misemploy the Goods of the Deceased, are in Effect Executors de son Tort for abusing their Trust; and their own Efates shall be liable to make it good on a Devastavit, which is the only Remedy in such Case: Tho it would be unjust, that the Fraud of one Executor, who acts feparately, should charge the others.

### Debises, in Wills, wied all gui

Evise is that A& by which a Man gives or bequeaths his Lands or Goods, by his last Will and Testament.

Devises of Lands or Tenements are to be made in Writing, and figned by the Devisor, in the Prefence of three credible Witnesses; and no Devise in Writing shall be revoked, but by some other Will in Writing, or by cancelling the same by the Testator himself, or by his Direction, in his Pre-

fence. Stat. 29 Car. 2.

A Devise must be of Lands in Fee-simple, or Chattles; and not of Entail'd Lands. A Devise of the Profits of Land for Years, is a Devise of the Land it self, for so many Years as the Profits are devised. If a Man devises, that A. B. shall be his Heir, or have all his Inheritance, in both these Cases a Fee passeth: But if a Man Devises his Lands to his Children, without more Words, this is but a Devise for Life. 1 Roll. Rep. 398. Hob. 75. Co. Lit. 25.

The Words of a Will the Law interprets more favourably for the Devisee, than those of a Deed: For if Lands be devised to a Man, to hold to him for ever, the Devisee shall have Fee-simple; but if it were given in this Manner by Feossment, he has but an Estate for Life: So if one Devise Land to an Infant in his Mother's Belly, it is a good Devise; but it is otherwise by Grant or Gift, in which Case there ought to be one of Ability to take presently.

Co. Litt. 111.

A Devise to one of a Thing which the Law would have cast upon him, is a void Devise; as a Devise in Fee to the Devisee's Son and Heir, is a void Devise; and the Law shall adjudge him in by Descent. Style's Reg. 284.

In a Will of Goods, there must be an Executor; but not in a Will of Lands. A Man can make but one Will to be of Effect; tho' he may make several

Codicils.

Devices are to be in Writing to prevent Fraud: Entailed Lands may not be devised, because a Man in himself, hath only an Estate in them for Life, and his Will takes not Effect till his Death. By Device of Profits of Lands, the Lands are devised, or the Devisee cannot come to take the Profits. A Devise making a Man Heir, is good for the Inheritance, which belongs to the Heir: But in other Cases of Devises, no Estate being limired, the Law limits the Estate for Life, which is certainly meant. Wills by the Law shall be favonred beyond other Deeds, because they are a Man's last voluntary Settlement, and he is supposed to be in a hurry. A Title at Law, by Difcent, &c. is paramount to that by Will. An Executor hath nothing to do with the Freehold, to be in Devises of Lands. And a Man's last Will only is of Force, fo that more than one cannot be; but as Codicils are only, as it were, a Part of the last Will, there may be many.

If a Man devices Lands in Fee-simple, or for Life, which is a Freehold, the Device may enter upon the Lands devised without the Appointment of any: But where Goods are devised, they may not be taken without the Appointment of the Executor. Co. Lit. 111.

A Devise of a Freehold, on the Death of the Teflator, is in by the Devise, and he may enter, there being no Executor to controul him: But to Devise of Goods, Assent of the Executor must be had, because there may not be Goods sufficient to pay the Debts and Legacies, of which the Executor only can judge, and he is answerable.

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# Discent.

Discent is an Order or Means whereby Lands or Tenements are derived unto any Man from his Ancestors.

And this Discent is either Lineal or Collateral; Lineal Discent is conveyed downward, in a right Line, from the Grandsather to the Father, from the Father to the Son, &c. And Collateral Discent springs out of the Side of the whole Blood, as Grandsather's Brother, Father's Brother, &c. In the Right ascending Line, Children inherit their Ancestors without Limitation; and the Ancestors cannot take from their Children; but in the Collateral Line, the Uncle as well inherits the Nephew, as the Nephew the Uncle. Co. Lit. 13. Vaugh. 244.

If a Man purchases Land in Fee-simple, and dies without Issue, there, for Default of the Right Line, he, which is next of Kin in the Collateral Line, the never so remote, comes in by Discent as

Heir to him. 1 Inft. 10.

In Discents, the next and most Worthy of Blood shall inherit, as the Male and all Discendants from him, before Females; and the eldest Son and his Posterity before any younger Son, &c. A Sister of the whole Blood, shall be preferred before the younger Brother of the half Blood; But such a younger Brother may be Heinto his Father or Uncle, although not to a Brother. Lit. 4. 1 Inst. 14.

A Person must be Heir of the whole Blood, to be entitled to a Discent in Fee-simple; for if a Man hath Issue two Sons by divers Venters, and the Elder Purchase Land in Fee, and die without Issue, the Younger Brother of the half Blood shall

not have the Land, but the Uncle of the elder Brother, or his next Cousin, shall have the same

Co. Lit. 14.

Whenfoever Lands descend on the Part of the Father, the Heis of the Part of the Mother shall never Inherit; and whensoever Lands Descend from the Part of the Mother, the Heirs of the Part of the Father shall never Inherit. Co. Lit. 13.

But in Case of Purchase, it is otherwise; for is a Son Purchase Lands and die without Issue, the Heirs of the Father's Part, if any, shall have it; but if none, then the Heirs of the Mother's Part.

In Discents of Regal Dignities, Jus primogeni-

tura, is not always observed.

Lineal Discent, which is the worthieft Means whereby Lands can be acquir'd, is tied to a Man's Issue, and immediate Posterity; but the Collateral Line is not fo strictly limited, because 'tis for the Supply of Heirs. To have Lands by Discent as Heir. a Man must be of the whole Blood; for it is his having the Blood of the Ancestor he Reprefents, entitles him to the Land his Ancestor enjoved. Heirs of a Woman can't Inherit the Man's Estate, because they have none of his Blood; nor of a Man the Woman's, for the same Reason: But in Case of Purchate by a Son, there the Heirs on both Sides shall take, as the Money for the Purchase may arise from both Sides, rather than the Estate shall Escheat. The Good of the Publick is politically regarded in Discents of Regal Dignities beyond Pedigree.

If there be three Prothers, and the middle Brother, or the youngest, purchase Lands in Fee-simple, and die without Issue, the elder Brother shall have the Land by Discent. Lit. 3.

The Elder Brother is the most Worthy of Blood, and he shall take jure fanguinis.

Discon-

### Discontinuance.

Discontinuance signifies an Interruption or Breaking-off; as Discontinuance of Possession, &c.
The Effect of which is, that a Person may not Enter upon his own Lands alienated, whatsoever his Right be to it, but must bring his Writ or Action at Law.

As if a Man Alien the Land he hath in Right of his Wife; or if Tenant in Tail make any Feoffment, or Lease for Life not warranted by the Stat. 32 Hen. 8. such Alienations, being by Fine, or Livery of Seisin, are called Discontinuances; which are Impediments to an Entry, whereby the Heir and true Owner is driven to his Action. Co. Lit.

Tenant in Tail makes a Lease for Life of the Lessee, and afterwards sells the Reversion to a Stranger, the Tenant for Life dies, the Grantee of the Reversion enters in the Life of Tenant in Tail; this is a Discontinuance in Fee, and here, if the Tenant in Tail die, his Issue cannot Enter, but is put to his Formedon: But if the Lessee for Life had survived the Tenant in Tail, the Entry of the Issue had been lawful. Co. Lit. 333.

When Estates of Lands, &c. which work Discontinuances are Deseated, the Discontinuances themselves are also Deseated: As if the Husband be seised of Land in Right of his Wife, and make a Feossment in Fee upon Condition, and die; here, if afterwards the Heir Enter upon the Feossee for the Condition broken, the Entry of the Feme is lawful upon the Heir. 1 Inst. 336.

In this Case by the Entry of the Heir for the Condition broken, the Discontinuance is Deseated.

The Reason why Alienations in Fcc, Tail, or for Life, by Tenant in Tail, &c. do make a Discontinuance, to take away the Entry of the Issue in Tail, and him in Reversion or Remainder, is because Tenant in Tail, and such Issue, and he in Reversion, &c. are Privies in Estate, which Privity is taken away by such Alienation, and without it Entry may not be had: And it is also for the Benefit of the Purchaser, and Maintenance of his Warranty; which would be prevented, if the Entry of him that had Right, were lawful.

### Diaeian.

A Disseisin is an unlawful Dispossessing a Man of his Lands, Tenements, or other Immoveable

or incorporeal Right.

If any Person wrongfully Enters on the Lands of another, and expels the Owner, he gets the Freehold and Inheritance by Disseisin; and may hold it against all Men, but him that hath Right and his Heirs: And if a Disseisor (who hath peaceable Possession for five Years) continue in Possession of the Land, and die seised thereof, whereby it descends to his Heirs, they have a Right to the Possession till the Person that hath Right recovers at Law: And in case no Suit be commenced within sixty Years, for Recovery of the same, the Owner will lose his Estate for ever. Bac. Elem.

If my Disseisor be disseised, and after I Re-enter, I cannot have an Action of Trespass against the second Disseisor; but by a Fiction in Law, I shall recover all the mesne Profits against the first Disseisor, his Servants and others, who have committed Trespass by his Commandment, and in his

Right. 11 Co. Rep. 51.

If one enter wrongfully into my Land, and after his Entry I accept Rent of him for the Land, I cannot afterwards take him for a Diffeifor. Dyer 173.

Entry on Lands must be obtained by Law, or it is wrongful; but if wrongly had, the Land may be with-held, till recovered at Law, by the Right Owner, which is to be in a certain Time limited, to prevent Loss thro' Negligence. If a second Diffetior were to be professed by the Owner of the Land, he would be doubly charged by the Owner and the first Dissolot. Acceptance of Rent Assents to an Entry, and purges the Wrong, by admitting a Man for Tehant.

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A Distress is taken to compel the Party distrained to pay his Rent, or other Duty; or to Replevy the Distress, and try by Action the Right to the same.

It is to be taken upon the Land charged therewith, and to be Reasonable; and must be carried to the Common Pound in the Hundred, or be kept in some open Place. Distress ought to be always of such Things whereof the Sheriss may make Replevin, and deliver again in as good Case as they were at the Time of Taking. But a Horse in an Inn, Sacks of Corp in a Mill, another Man's Garment in a Taylor's House, Gc. may not be distrained: Nor may a Man's Instruments of his Trade, Cattle of the Plough, Books belonging to a Scholar, Gc. be distrained, where there are other Goods. Co. Lit. 47.

When a Distress is taken, if the Rent be not paid, or the Distress replevied in five Days, the E 3 Goods

Goods are to be appraised and sold for Payment. And if the Goods are fraudulently Convey'd away from the Premisses, they may be seized in five Days wheresoever sound. Stat. 2 W. & M. c. 5. and 8 Ann. c. 17.

Distress taken on Purpose to injure any Person, incurs treble Damages; and where no Rent is due,

double the Value of the Goods and Cofts.

The Land is answerable for the Rent by Diffress; but Diffresses are to be Reasonable, otherwise a Tenans might be damaged thereby. The Common Pound is the Place for the Diffress, that the Tenant may feed his Beafts, and see there is no unjust Design upon them. If Distresses were not of fuch Things as might be delivered again, one End of Distresses would not be answered. It is reasonable the Property of others should be exempt from Diftreffes made on others; and that Things for the Publick Good should not be difirained. The Time of Replevying, &c. is appointed, that Landlords may not oppress Tenants by immediate Sale. Wrongful Distresses are punishable, because they injure a Man's Credit, and Disgrace him.

A Man cannot distrain that in which he claims a Property; as the seiling of a Stray is not a Distress of it, for he that seiles it claims a Conditional Property. Co. Lit. 47.

This is, because to Distrain is but to take one Thing for another, and to put it into the Custody of the Law, as a Pledge for it.

#### Diffribution.

Distribution of Intestates Estates, shall be made as follows, viz. One third Part to the Wise, and the other equally amongst the Children and their Representatives. If there be no Children, one Moiety of the Personal Estate shall go to the Wise, and the Residue equally to the next of Kin. And if there is no Wise, but Children, it shall be distributed among such Children; and if there be no Wise nor Children, it shall go to the next of Kin in equal Degree. Stat. 22 & 23 Car. 2. c. 10. If Children die after their Father, but before

If Children die after their Father, but before their Mother, without Wife or Child, the Mother and every Brother and Sister, and their Representatives, shall have equal Share in the Estate of such Intestates. 1 Jac. 2. c. 17. But no Representatives are allowed after Brothers and Sisters Children; and Children advanced by the Intestate in his Life-time, with any Estate equal to the other Shares, are excepted.

And the Stat. 22 Car. 2. is not to extend to the Estates of Feme Coverts, who die Intestate; but the Husband shall have Administration, and not be compellable to make any Distribution. 29 Car. 2. 1 Lill. Abr. 579.

If a Man die without making any Will or Disposition of his Personal Estate, it is sitting the Law should appoint a just Distribution thereof amongst the Relations of the deceased, to avoid Quarrels and Contests between them, which would most certainly follow, if they were to divide it themselves. But the Estates of Feme Coverts are not to be distributed because they are their Fortunes given by Marriage to the Husband.

E 4

Divozces.

#### Dibozces.

Divorce is a Separation of two Persons matried together, made by Law: And there are two Kinds of Divorces, one A Vinculo Matrimonii, the

other A Mensa & Thoro.

The Woman divorced a Vinculo Matrimonii, receives all again that the brought with her; for this only arises upon a Nullity of the Marriage through fome Impediment, as Consanguinity, Pre-contract, Impotency, &c. And if a Woman is divorced a Mensa & Thoro, she may have her Dower, it being a particular Divorce, and may sue for Alimony or Maintenance out of the Husband's Estate, during the Separation, either in the Chancery or Spiritual Court, and it will be allowed; except it be in Case of Elopement, or Adultery. Co. Lit. 235.

Upon a Divorce, the Marriage being annull'd, the Woman shall have the Goods given in Marriage, as a Portion, not being spent. Dyer 13.

There are Divorces for several Causes: For Adultery, &c. the Parties may not by Law marry again, but are to live Charly: But for Consanguinity, Impotency, &c. they may; because Persons of near Affinity, may not lawfully Marry by God's Law; and Persons Impotent are not capable of the Marriage Duty, so that it is reasonable the Parties not Impotent should be married to those of Ability. If other Divorces would capacitate Second Marriage, 'twould amount to unmarrying Persons, for the End of multiplying Marriages and Crimes. A Woman divorc'd, not for Adultery, shall have her Goods again, they being given for her Advancement and Maintenance.

# Duels.

A Duel is a Fighting between two Perfors upon

A some Quarrel precedent.

of the pair more thank

In Duelling, not only the Principal, who actually Kills the other, but also his Seconds are Guilty of Murder, whether they fought or not: And some of our Books tell us, that Seconds of a Person Kill'd

are likewise equally Guilty. H. P. C. 91.

If a Man Challenge another in a Duel, who at first resuleth to fight him, but afterwards upon Importunity meets and kills him, 'tis Murder. I Roll. Rep. 360. And to Challenge another, either by Word or Letter, to Fight a Duel, or to be the Meffenger of such a Challenge, or endeavour to provoke another to send a Challenge, or to Fight, is a very high Offence. 3 Inst. 158.

Persons convicted of barely sending a Challenge have been adjudged to pay a Fine of 100 l. and im-

prisoned for a Month. 1 Sid. 186.

Seconds in Duelling are Guilty of Murder, by the Encouragement they give their Principals in executing their Purpose; whereby they become as it were Accessary to it, and the Common Law allowing no Accessaries in Murder, they are all Principals. All Challenges are unlawful, and describe Punishment, because they incite an Action against Law, wherein Murder may be committed, and there is apparent Danger of it. They are a Defiance of the Law.

If one Man wound another in a Duel, and afterwards they meet and fight a second Time, and the Person wounded Kills the other, 'ris Murder in him; but if the other Kill the wounded Man, 'tis only Manslaughter. Dals. 345.

This

This nice Turn in the Law is built upon the reasonable Grounds of Malice in the Person wounded; and that the Malice of the other was appeared by giving the Wound,

#### Durels.

DURESS is where one is wrongfully imprison'd or restrained of his Liberry, contrary to Law, till he seals a Deed, &c. or where a Man is threatned to be killed or wounded, if he doth not do it.

If a Man is taken by Virtue of a Process issuing out of a Court that hath not Power to grant it, &c. and for his Enlargement gives Bond, this may be avoided as had by Duress. And if a Man be lawfully in Prison, and makes an Obligation against his Agreement and Will, he may avoid it by Duress; but 'tis otherwise if he do it of his good Will. Cro. Eliz. 646. 4 Co. Inst. 97. 2 Danv. Abr. 686.

A Person threatens another to make a Deed to a third Person, it is by Duress and void. A Will shall be avoided by Duress or Menace of Imprisonment. A Feosfment made by Duress is voidable, but not void. Obligations obtained by Force, of Women to marry the Persons to whom made, are void: And a Marriage had by Duress, is voidable, of a Roll. Abr. 862. 31 H. 6. c. 9. I Lill. 494.

The Reason of our Laws on this Head is plain and apparent; for it is the voluntary A& and Consent of the Mind, which makes Things transacted Lawful and Binding; and no Man can be justly said to do a Thing without the Concurrence of his Mind; and as all Force and Compulsion are contrary to it, therefore A&s done by Persons under such Restraint, shall be adjudged void in Law.

Eccle=

### Ecclefiaftical Laws.

Such Canons, Constitutions, and Ordinances as have been allowed by general Consent and Custom within the Realm, and are not contrary to the Laws and Statutes of the Kingdom, nor to the Damage or Hurt of the King's Prerogative, are still in Force within this Realm, as the King's Ecclesiastical Laws of the same. 5 Rep. 32.

The Spiritual Laws mentioned in Littleton, are fuch Ecclesiastical Laws as are allowed by the Laws of this Realm, viz. which are not against the Common Law, nor against the Statutes or Customs of the Kingdom: And the Jurisdiction of these Laws was so bounded by the Common Law, and so declared and enacted by Act of Parliament. 1 Inst. 344.

The Stat. 35 H. 8. c. 19. fettles the Jurisdiction of the Ecclesiastical Laws.

As the Common and Statute Laws are the general established Laws of the Land, 'tis sitting no other Laws should be contrary to them, and because they might create Confusion: And since Custom and Consent of the People, hath introduced these Canons; by the general Consent of the whole Realm, in Parliament, any of them may be altered or abrogated; as the Common Law, founded on Custom, is by the Statute Law, where Defective, and there has been a Necessary for it.

# Gjeament.

E for the Lessee for Years, who was ejected before the Expiration of his Term, either by the Lesser or a Stranger. But now it is most commonly used to Eject the Lessee for holding over his Term, or for Non-payment of his Rent, &c. Or to try the Title to Lands. F. N. B. 220.

Ejectment is either an actual Ejectment, as when the Lessee is actually put out of the Land; or else it is by Implication of Law, where such an Act is done by one which doth amout to an Ejectment; although he doth not really enter upon the Land

les, and ouft the Lessee.

And this Action must be brought for a Thing that is Certain, and not of an uncertain Thing. And in the Declaration the Land must be laid in the proper Parish, that the Venue may be from thence: Also the Declaration must be served on the Person in Possession, or his Wife, and none else.

Cro. Eliz. 339.

The usual Course in this Action, is to draw a Declaration, and therein seign a casual Ejector or Desendant, and deliver the Declaration to the Ejector named, who serves a Copy of it on the Tenant in Possession, &c. and gives him Notice at the Bottom to appear and desend his Title, or that he the seigned Desendant will suffer Judgment by Desault, whereby the true Tenant will be turned out of Possession; to which Declaration the Tenant appears by Attorney, and consents to a Rule to be made Desendant in the Place of the casual Ejector, &c. 2 Cro. 1500 1 Lill. 497.

No Man may be turned out of Possession, lawfully had, but by Law; wherefore Process of Ejectment is necessary: Ejectment must be of Things certain, that the Sheriff may certainly know what to deliver Possession of on Recovery; without which there can be no Fruit of the Action. The Jury is to be from the Place where the Lands lie, if they lie in any Parish, and not from the Body of the County. And the Declaration must be served Personally, by Reason of the great Penalty of these Actions, viz. turning out of Habitation.

Actions in Ejectment may be brought one after another, for the same Land; for a Judgment in this Action is not final. Trin. 23 Car. B. R.

Profession Or Promote to

Because it is generally only to recover Possession of the Land, wherein the Title is not primarily concerned.

# Elopement.

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Lopement is where a married Woman, of her own accord, goes away from her Husband, and lives with an Adulterer.

A Woman so leaving her Husband, is said to elope: And in this Case her Husband is not oblig'd to allow her any Alimony; nor shall he be chargeable for Necessaries for her, as wearing Apparel, Diet, Lodging, &c. And whoever gives her Credit doth it at his Peril, where the same is notorious. I Roll. Abr. 350.

Also a continual Elopement of the Wife, without being reconciled to her Husband, forfeits her Dower. Stat. 13 Ed. 1.

be made in swency Years etc. But subcre. a Pine

It is Reasonable that a married Woman, who thus scandalously leaves her Husband, and thereby deprives him of her Conversation and Service, should forfeit all Right of Maintenance from him, unless he is reconciled to her, and forgives the Offence.

#### Entry.

ENTRY properly signifies the taking Possession of Lands or Tenements: Or it is used for a Writ of Possession.

An Entry is not good, where there is no Interest: A Man may gain Possession to an Estate by Entry, when he has Right of Entry, and there is no Discent or Discontinuance, to take away the same. Where a Disseisor dieth seised, and the Law casteth the Lands upon his Heir, this is a Discent which tolls an Entry. If, where there are several Sons, the eldest Son dies, and the youngest Enters, tho many Discents are cast in his Line, yet may the eldest Son's Heirs make an Entry on the Lands: But if the Lands are conveyed away by Feossment in Fee, by the youngest Son, and the Feosses dies seised, the Entry is barred, Co. Lit. 244, 237.

If he, who hath Right of Entry into a Free-hold, Enter into Part of it, this Entry shall be accounted an Entry into all that Part of the same which is in the Possession of one Tenant, tho he entred not into all that he possessed. An Estate of Freehold will not cease by the Law, without Entry or Claim: And a Man must Enter to take Advantage of a Condition, or if he cannot Enter,

he must make his Claim. Co. Lit. 218.

In Actions for Recovery of Lands, Entry is to be made in twenty Years, &c. But where a Fine

is passed, Entry must be made within five Years: And to make Claims and Entries on Lands of Force, to avoid Fines, &c. an Action must be commenced within one Year next after the Entry or Claim, and be prosecuted with Estect. Stat. 21 Jac. 1. c. 16. and 4 & 5 Ann. for Amendment of the Law.

Entry of the Heir upon Lands descended to him on the Death of an Ancestor, is necessary to entitle him to the Rents and Profits. No one can reserve the Power of Entry for a Condition broken to any other but himself, his Heirs, Executors, &c. Parties, and Privies, in Right and Representation. Co. Lit. 214. Dyer 131.

A Person out of Possession, cannot make a Lease of Land, but by Entring and Sealing the same on the Land: And a Lessee must enter into Lands demised, which he may do though the Lessor dies; and if the Lessee dies before Entry, his Executors, orc. may enter. Lit. 59, 454. Plowd. 176.

A Writ of Entry lieth at Common Law, for him in Reversion, where Tenant for Life, &c. Aliens in Fee.

There must be a Right of Entry, to justify Entry; and Rights by Discent are preferred. A Disseifor's dying seised, entitles his Heir to Enter, the Estate in Law being supposed in him, as his Father died seised; so that the Person having Right, is excluded Entry. Where a younger Brother Enters on the Death of an Elder, it shall not take away the Entry of the Heirs of the Elder; for they may Enter, because they have Privity of Blood, and Claim by the same Title; but the Privity of Blood faileth where a Feossment is made, and the Feossee, who is a Stranger, dies seised. Entry on Part of the Land, is in Law an Entry on the whole; and it cannot be presumed a Man should enter upon all. To an Estate of Freehold, En-

# 64. The Student's Companion:

try is required by the Common Law; and therefore it may not cease without Entry. Actions are to be prosecuted upon Entries on Alienations; for in these Cases the Action is the Claim at Law. An Heir to Lands can't well be said to be in Possession to have Prosits, without Entry, though he hath Right. A Lessee must enter, or he cannot bring Trespass, &c.

### Equity.

E Law, generally made in that Part wherein it

faileth, or is too severe.

It is also said to be a Construction made by the Judges, that Cases out of the Letter of a Statute, yet being within the same Mischief, or Cause of Making, shall be within the same Remedy that the Statute provideth. For when the Words of a Statute enjoin one Thing, they enjoin all other Things that are in the like Degree: As the Stat. 9 Ed. 3. c. 31. ordains, that in an Action of Debt against Executors, he that comes in by Distress shall answer; the said Act shall be extended by Equity to Administrators.

The Stat. Westm. 2. provides, that whenever there shall be found in Chancery, that in one Case there is a Writ, and in the like Case, salling under the same Right, and wanting the like Remedy, no Writ is found, the Clerks in Chancery are to agree in making a new Writ, &c. 7 Co.

Rep. 4.

Equity, which is built on the most exalted Reason, aims at Equality in Determinations of Justice; And because no Legislators can possibly set down in their Laws all Cases which may happen in express Terms, that Failure and Omission is to be refor-

reformed by Equity: And the Great Design of Equity, is, that so Case whatsoever be without Remedy.

#### Escapes.

E Scape is where one arrested or imprisoned, gets away from the Person having him in Custody

before delivered by due Course of Law.

Sheriffs and Gaolers permitting a voluntary E-scape, in a criminal Case, are esteem'd Guilty of the Crime done by the Ossender, and must answer for it: And for negligent Escapes, the Gaoler, &c. is to be fined. But in Civil Actions there is a Disference between Arrest on mean Process and Execution. The Rescous and Escape of a Person upon Arrest, before brought to Gaol, may excuse the Sherist in Action of Escape; but when the Prisoner is taken upon Execution, or when he is in Gaol, it is otherwise. H. P. C. 112. 2 Co. Inst. 105, 589. 1 Roll. Abr. 807.

In Case of a tortious Escape, of a Prisoner taken in Execution, the Party may have a new Capias to take him in Execution again, or Action on the Case against the Sheriff. But if the Sheriff voluntarily permit the Escape, Action of Debt is to be brought against him; and the Prisoner is discharg'd

from the Plaintiff. 1 Lill. Abr. 536.

Action of Escape will not lie against the Executor or Administrator of a Sheriff, &c. Cro. Eliz.

If a Gaoler, &c. suffer an Offender to escape voluntarily, it is fitting he should stand in the Place of the Criminal, to satisfy Publick Justice; and that he be severely fin'd for his Negligence, attended with the worst Consequences to others. On a common Arrest the Sheriff may not ordinarily

# 66. The Student's Companion:

raise the Posse Comitatus to execute the Process; as he may to take and secure one in Execution that is condemned by the Law. A new Execution is necessary on a tortious Escape, or a Remedy would be wanting for the Party recovering. And Action lies against the Sheriss for an Escape, because he is accountable for his Prisoner; but not against his Executors, &c. after his Death, by Reason it is a personal Wrong, which dies with him.

A Gaoler refusing to receive a Person arrested by the Constable for Felony, whereby he is let go, is Guilty of an Escape, for which he shall be punished. 3 Co. Rep. 71. And if a Murder is committed in a Town, in the Day-Time, and the Murderer not taken, it is an Escape, for which the Town shall be amerced. 2 Inst. 590.

The letting a Prisoner go is a releasing of him from the Punishment which is his due, and letting him loose to further Mischief, and therefore punishable; and the Town is supposed to do so of a Murderer escaping.

#### Effoin.

The Plaintiff or Defendant cannot appear at the Day in Court, then he shall be essoin'd to save his Default: And Essoin is a Kind of Imparlance, or Craving of longer Time, that lies in Actions Real, Personal and Mix'd. 2 Co. Inst. 125.

But where any Judgment is given, or the Party is distrain'd by his Lands, the Sheriss is commanded to make him appear, &c. Essein will not be allow'd; and after the Tenant hath once appear'd in Writ of Assis, he shall not be essein'd, but the Inquest is to be taken by Default, &c. 3 E. 1. 42.

There

There are lawful and reasonable Excuses for Defaults of Persons, and when such are exhibited the Court will allow of them; but after Judgment, De it is too late to put off and delay the Proceedings of the Court.

### Erecutors.

N Executor is he that is appointed by a Man's Last Will and Testament, to have the Execution thereof, and the Disposing of the Testator's edy by yearnest

Substance, according to the Will.

An Executor hath as Affets all Goods and Chattels, &c. of the Testator, and may recover a Debt or Duty which was due to the Testator, altho he be not named: And an Executor shall be bound by his Testator's Covenant, altho' he is not named therein: but an Heir shall not be bound unless he be particularly named. Dyer 14, 305.

Executors or Administrators shall have Actions of Debt for Arrearages of Rent, and take Diffreffes against the Tenants in Possession, in the like Manner as the Testator might or ought to have done: And Executors are to have the like Writs, Actions and Process, as the Testator might have had. Stat. Westm. 2. 23. 13 Ed. 1. and 32 H. 8. c. 17.

It is a Rule in Law, that where the Testator might have waged his Law, his Executors shall not be charged with that Duty; so that Debt lieth not against Executors for the Diet of the Testator, for he might have waged his Law, and so have freed himself thereof. 9 Rep. 87.

If after the Death of a Man, none takes upon him to be Executor or Administrator by Law; and a Stranger use the Goods of the deceased, or

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take them into his Possession, which is the Office of an Executor or Administrator, such Stranger may be charged as Executor in his own Wrong. And if a Stranger claiming to be Executor, take the Goods, pay and receive Debts, &c. and intermeddle as Executor, 'tis the same Thing; he is Executor in his own Wrong. The Executors and Administrators of Executors in their own Wrong, shall be liable to pay the Debts of the Testator.

5 Rep. 33. 30 Car. 2.

An Executor is to pay all the Debts of the Teftator, before any Legacies; which may be fold for
Payment of the Debts, if there be not otherwise
enough to pay them: And the Debts are to be paid
in the Order following; first, Debts to the King,
Debts on Judgments, Statutes, &c. Then Debts
on Mortgages, Bonds, and other Specialties; and
lastly, Rent, Servants Wages, Debts on ShopBooks, &c. And if a Man accepts an Executorship, and pays any Debts before those of a higher
Nature, he is liable to the Payment of all the rest,
tho out of his own Estate. Plowd. 543.

The first Business of an Executor is to bury the Deceased, according to his Rank, and after that make an Inventory of his Goods, Chattels, Debts, &c. in the Presence of two Legatees, or other sufficient Persons; then prove the Will, sell the Goods

and Chattels, receive and pay Debts, &c.

An Executor is co-relative with, and Representative of the Person of the Testator, so as to receive his Debts, persorm his Covenants, &c. And where a Testator could have Remedy by Action, or otherwise, it is reasonable his Representative should have it. If a Testator might wage his Law, on his Death, the Advantage and Desence is lost by the Act of God, and no Desault of his; wherefore his Executors, who Represent him, shall not be prejudiced thereby. Strangers ought to take Care of intermeddling with the Testator's Goods, because they may hinder rightful Executors; and the Creditors of the Deceased have no other against whom they may bring their Actions for their Debts; for the Law knows no other. Debts are an absolute Duty of the Testator, and consequently shall be paid before Legacies, which are Matters of Curtesy and Gratification only. And Debts of a higher Kind are to be paid in Order first, because they ought to be so paid by Law, and Respect being first due to them by their Nature. A Person must not be buried above his Rank, because Creditors may be wronged by the Expence of it.

If a Man Devises by Will, that his two Executors shall sell his Land, and one of them dies, the Survivor may not sell it; but if he had devised his Land to his two Executors to be sold, in that Case the Survivor shall sell it. Co. Lit. 181.

A Devise, that Executors may sell, is not of the Force of a Disposition to Executors to be sold; because in the first Case there is but a bare Trust and Authority, which ought so be strictly observed; but in the last Case there is a Trust coupled with an Interest, which shall survive.

# Execution.

EXecution fignifies the last Performance of an Act after Judgment, &c. which makes Money of the Defendant's Goods, or other Things, and delivers them to the Plaintiff, which he accepts in Satisfaction, and is the End of the Suit.

There are three Writs of Execution in Personal Actions, a Capias ad Satisfaciendum against the Debtor's Body, a Fieri facias against his Goods, and an Elegit for a Moiety of his Lands. And if

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you sue forth a Writ of Fieri facias against the Desendant's Goods, and Levy Part of the Debt, but not the whole, you may afterwards have a Capias ad satisfaciendum against his Body, or an Elegit for the Residue; but if you first imprison the Desendant on a Capias ad satisfaciendum, then you are debarred from bringing Fieri facias against the Goods, or an Elegit against the Lands, whilst the Desendant continues in Execution.

In Real and Mix'd Actions, Execution is either by Habere facias Seifinam, to put the Party in Possession of his Freehold recovered by Judgment of Law; and Habere facias possessionem, to put him in Possession of his Term, &c. 1 Co. Inst. 289.

5 Rep. 86.

If one be arrested upon Process in B. R. and puts in Bail, and afterwards the Plaintist recovers, and the Desendant renders not himself according to Law, in Sase-guard of his Bail, the Plaintist may at his Election take Execution against the Principal, or his Bail; but if he takes the Bail, he shall never afterwards meddle with the Principal. Also if the Principal be in Execution, he cannot take the Bail. Cro. Jac. 320. 2 Nels. Abr. 776.

After a Judgment is sign'd, there may be Execution taken immediately upon it. And if Execution be not taken within a Year and a Day after Judgment is given in a Cause, where there is no Fault in the Desendant, as for Instance, where there is no Injunction, or Writ of Error, &c. to prevent it, there must be a Scire facias taken out to Revive the Judgment, or Execution shall not be had: And in Case of the Death of either of the Parties in the Cause, Scire facias must be obtain'd to Revive the Judgment. Style's Reg. 296.

If Chattels are sufficient to pay the Debt, the Sheriff ought not to extend the Lands: Goods pawn'd,

pawn'd, Goods bought bona fide, depending the Action, Things annexed to the Freehold, &c. shall not be subject to Execution. By the Common Law one could have Execution only against Goods and Chattels, and of Corn or other present Profit of the Lands by Fieri facias, or Levari facias; not of the Body, on Account of Liberty, or sure Profits of Land, allowed by Statutes. 8 Rep. 143. 1 Inst. 289. 2 Inst. 394.

When an Execution is return'd, executed and filed, the Party can never have another Execution upon that Judgment upon which the Execution was grounded. But where a Man dies in Execution, the Plaintiff may have another against his Lands, &c. as if he had never been taken in Exe-

cution. 21 7ac. 1.

Writs of Execution bind the Property of Goods only from the Time of Delivery to the Sheriff, &c. but Land is bound from the Day of the Judgment. Stat. 29 Car. 2. c. 3. Goods or Chattels of Tenants in Messuages, &c. Leased, shall not be taken in Execution till the Rent be paid the Landlord, not exceeding one Year's Rent, &c. by Stat. 8 Ann. c. 17.

One in Execution shall not be delivered out of Prison but by Writ of Supersedeas. 1 Lill. 565.

Where the Plaintiff imprisons the Defendant's Body till Satisfaction is made, he is barr'd from the other Writs of Execution; because a Man's Body is the most Dear and Valuable to him, and the Law supposes he will do his utmost for his Releasement; but it is not so in Case of Goods. Writs of Execution, as well as Actions, concern the Reality or Personality: And when a Person has his Election, and chuses accordingly, it shall be intended for the best and be conclusive. Judgments are forgotten, if not presently executed; and therefore they are to be Reviv'd, when Execution is neglected or delayed.

delayed. On the Death of Parties, it is as it were a new Cause to their Heirs and Executors, so that Scire facias is necessary. Goods and Chattels are the most proper Things of Satisfaction; but Goods pawn'd, &c. the Defendant hath not absolute Property in. There can be but one Execution on one Judgment, unless where a Party dies; when others are permitted, that there may not be a Failure of Satisfaction. As a Landlord's surest Remedy is Distress for Reut, 'tis sit his Rent should be paid when he is deprived of that Remedy, by taking the Goods in Execution.

#### Ertentg.

EXtent fignifies a Writ or Commission to the Sherist for the Taking and Valuing of Lands and Tenements, in order to the Satisfaction of a Debt

or Duty.

The Writ Elegit is given by Statute upon Recovery of Debt or Damages, &c. for the Sheriff to deliver to the Party recovering, All the Chattels of the Debtor, (except Beafts of the Plough) and the Moiety of his Land by reasonable Price and Extent, till the Debt is levied. 13 Ed. 1.

And the Appraisement and Extent upon the Elegit, shall be found by the Inquest of twelve Men. If Goods are appraised by Appraisers, and they appraise them too high, the Goods shall be delivered to the Appraisers themselves, at the Rate

they fet on them. Plowd. 80.

A Moiety of the Lands is to be delivered in Extent, till the Debt is satisfied; the other Moiety the Debtor enjoys for his Support in the mean Time. And the Extent concerning Lands, is to be made by an Inquest of twelve Men, and not the Sheriff only, that there may be no room for Partiality. If Appraisers Value Goods too high, they shall take them as a Punishment they intended others.

Estin:

# Ertinguichment.

E Xtinguishment is the ceasing of a Thing to which a Man had Right, by his own Act, and hath the Effect of Consolidation.

If a Man hath an yearly Rent due to him out of the Lands of another, and afterwards purchase the same Lands, now both the Property and Rent are consolidated, or united in one Possessor, and the Rent is said to be extinguished: So where a Man has a Lease for Years, and afterwards buys the Property, this is a Consolidation of the Property of the Fruit, and an Extinguishment of the Rent. Terms de Ley, 327.

A Man having a Rent-Charge to him and his Heirs, issuing out of certain Lands; if he purchase any Parcel thereof to him and his Heirs, all the Rent-Charge is Extinct; for the Unity of Possession of Parcel of the Land, and of the Rent (by the Act of the Party) extinguisheth the whole Rent. 1 Inst. 149.

By the Purchase or Grant of an Estate in Feesimple, an Estate-Tail in the Lands is Extinct. An Estate-Tail of Baron and Feme, by a Divorce is Extinguished; and they have after but Estates for their Lives. 9 Co. 139.

If a Man purchase a higher Estate in Lands, &c. than he had before, his former Right or other Estate shall be drown'd therein and made void. And in Respect to Rent, when a Man hath the Land it self, out of which the Rent issues, the Rent is of consequence Extinct. A Man cannot himself hold Part of Lands out of which a Rent-Charge is paid, and at the same Time have the Rent-Charge; because the Rent-Charge is Intire, and issuing out of every Part of the Land, and cannot

cannot be Severed or Apportioned. By Divorce. an Eftate-Tail of Baron and Feme is Extind, as the Marriage, which was the Means whereby they might have Heirs inheritable, is disfolv'd.

# falle Imprisonment.

Alle Imprisonment is where any one is Reftrained of his Liberty, contrary to Law: It is a Trespals committed upon a Man's Person by

imprisoning him without Cause. 2 Inft. 53.

If a Process be unduly obtained, and the Party against whom it is had, be thereupon taken and Imprisoned, an Action of False Imprisonment doth lie, by the Party imprison'd, against him at whose Suit he is imprison'd; but not against the Officer who executes it. I Lill. 595.

Where a Bailiff arrefts the Party, after the Return of the Writ is past, Action of False Imprison-

ment lies against him.

By Magna Charta no Man is to be imprisoned, but by Law; and therefore, when ever any Man is imprisoned contrary to Law, confiderable Damages are awarded, with Respect to the Violence, a Man's Loss of Time, &c. Officers are not accountable for undue Processes; but if they arrest the Party after the Writ is returnable, 'tis the same Thing as if there were no Writ, and punishable accordingly.

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# falle Judgment, &c.

IF a Judge declares the Law erroneously, the Indicated may be reversed; and a Judgment shall be intended good till reversed by Writ of False Judgment, &c. A Jury giving a False Verdict, Attaint lies; whereon by the Common Law the Punishment was, That the Jurors Meadows should be plowed up, their Houses broke down, Woods grubbed up, and all their Lands and Tenements forseited to the King, &c. But by Statute, the Severity of the Common Law is mitigated; for a pecuniary Penalty is appointed, and Fine and Ransom at the Discretion of the Court. 1 Co. Inst. 294. Stat. 23 H. 8. c. 3.

A corrupt Judge or Jury are very heinous Offenders in the Eye of our ancient Law; and the giving a false Verdict is severely and exemplarily Punished, because thereby a Man's Life, Liberty, &c. may be forseited and lost.

# fee-ample,

A N Estate in Fee-simple is, where one hath Lands and Tenements, To Hold to him and his Heirs for ever: And a Man cannot have a

greater Estate.

All other Estates and Interests are derived out of Fee-simple; and the Word Heirs makes the Inheritance: For if an Estate be granted to a Man, To Hold to him for ever, or to him and his Assigns for ever, this makes but an Estate for Life, for want of the Words, His Heirs. But in Wills, which are more savour'd than Grants, an Estate

of Inheritance may pals without those Words; for it may be good, if it be given to one and his Af-

figns for ever. I Inft. 9.

There are three Sorts of Fee-simple: Fee-simple Absolute, such as I have already described; and Fee-simple Conditional, and Qualified. Conditional is when an Estate is Granted in Fee-simple, &c. with a Quality annexed by him that hath the Estate or Interest, whereby the Estate granted may be either deseated or enlarged upon an uncertain Event, and till then, the Estate granted is absolute: Qualified Fee-simple is that which may be Deseated by a Limitation, &c. Co. Lit. 18, 19.

If one give Lands to two, and their Heirs, the Donees have joint Estates for Life, and several Inheritances. A Feossment made of Lands to one, and his Heirs Males, is a Fee-simple, for want of the Word, Body, viz. Heirs Males of his Body: For it is not an Estate comprized within the Stat. of Westm. 2. De donis Conditionalibus; and before that Statute there were no Estates-Tail, but such Estates were Fee-simple Conditional. Mich. 23 Car. B. R.

A Fee-simple determinable upon a Contingency, is a Fee to all Intents; but not so durable as an absolute Fee. A Fee-simple cannot be limited upon

a Fee-simple; if it be, it is void. Dyer 33.

To have Fee, is to have Inheritance; and Fee fimple is an Estate without Limitation, so that it is the greatest a Man can have. The Word Heirs is the most extensive Word of any, because Heirs are derived from a Man's whole Blood, and it is the Blood which directs the Inheritance. A Fee-simple upon Condition, depends upon the Performance of the Condition, to subsist or not. Where Lands are given to two and their Heirs, the Estate must be joint to the Grantees; but afterwards it is otherwise as to their Heirs, for they cannot have

have one Issue. A Contingency destroys not a Fee-simple, because the Estate is good till the Contingency happens. A Fee-simple being the largest Estate a Person can enjoy or dispose of, no Fee-simple, or other Estate, may be limited after it.

# froffments.

A Feoffment is the Gift or Grant of Manors, Messuages, Lands, Tenements, &c. to another in Fee; To him and his Heirs for ever, by the Delivery of Seisin of the Thing granted.

The usual Conveyance at Common Law, was Feoffment, to which Livery and Selsin was necessary, the Possession being thereby given to the Feossee; but if there was a Tenant in Possession, so that Livery could not be made, then the Reversion was granted, and the particular Tenant attorned. Afterwards a Lease and Release was held a good Conveyance, but the Lessee was to be in actual Possession before the Release; tho' this is helped by the Statute 27 H. 8. which unites the Use to the Possession, without actual Entry, &c.

No Feoffment can be made of such Things whereof Livery of Seisin cannot be had; for no Deed of Feoffment is good to pass any Thing by Way of Feoffment, but where Livery of Seisin is duly executed upon it: Feoffment, without Livery of Seisin, is only an Estate at Will. Co. Lit. 5. Plowd. 214.

A Feoffment in some Respects is said to excel the Conveyance by Fine and Recovery; for it cleareth all Disseisns, Abatements, Intrusions, &c. which neither a Fine, Recovery, or any other Conveyance doth. 1 Inst. 9, 49.

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Conveyance by Feoffment has been of all others the most observed and regarded, because it is the most publickly made, and best remember'd and prov'd, by Reason of the Livery and Scisin: It passet the present Estate of the Feosfor, and barreth all the present and future Right to the Thing convey'd; it also bars the Feosfor from all Collateral Benefit, as Conditions, Powers of Revocation, Writs of Error, &c. and destroys contingent Uses.

### Felong and Larceny.

Felony is where any Thing is done with a fierce and bitter Mind. And Felonies by the Common Law are four, viz. such as are committed against the Life of a Man, against his Goods, against his Habitation, against Publick Justice. The Felonies by Statute are personating Bail, acknowledging Deeds inrolled in the Name of another, Buggery, Rapes of Women, maining Persons maliciously, so as to disable any Limb, burning of Woods, &c.

Where one is doing an unlawful Act, and the Death of any one ensueth upon the Doing of it, the the Death of the Party was not intended by him that did the Act, yet this is Felony. And if one be committed to Gaol for one Felony, the Justices of the Gaol-Delivery may enquire of and try him for another Felony, for which he was not committed, by Virtue of their Commission.

3 Co. Inft.

When a Person seloniously takes away the Goods of another, not from his Person, or out of his House by Night, &c. it is called Larceny; and is Grand Larceny, when the Thing stolen exceeds

and when it is under that Value, it is called Petit Larceny, and is punished with Whipping. 3 Inst. 107. But in Case of Larceny, the Jury may find the Goods of less Value than 12 d. tho a Man be indicted for stealing Things of the Value of 40 s. and so convict the Prisoner of Petit Larceny only.

Hetl. Rep. 66.

If a Shop-keeper deliver Goods to one, who pretends to buy them, and he runneth away with them, it is Felony. And if a Man deliver Goods to Work-people, and they steal them, it is Larceny. Stealing Goods and Chattels, which Persons by Contract are to Use, is Felony. If a Guest hath Plate set before him in a Tavern or Inn, it is Felony to take it away. A Butler that hath the Charge of Plate; a Servant, who hath the Charge of a Chamber, by Delivery of the Key to him, Gc. may be Guilty of Larceny. 3 Inst. 108. Raym.

And the least removing a Thing, tho' it be not quite carried off; as if one take Goods out of a Trunk, and lay them on the Floor, but is apprehended before he gets away, Oc. it is Felony.

2 Inft. 108.

But Personal Goods must not be of a base Nature, such as Dogs, &c. And some Things Fere Nature, made tame, it is not Felony to take them; as for Example, Apes, Monkies, Bears, Squirrels, Parrats, &c. But if Wild Beasts, sit for Food, are reduced to Tameness, viz. Deer, Hares, Conies, &c. he that stealeth them is Guilty of Felony. Also taking away Turkies, Geese, Ducks, or Poultry, Fish in a Trunk or Pond, &c. is Felony. 3 Inst. 109, 110.

A Man ought not to be arrested upon Suspicion of Felony, except there be good Cause shewed for the Ground of the Suspicion.

The Law fecures a Man's Life and Goods, and to violate them is Criminal. When a Person goes to do an unlawful A&, it is to be supposed he intends to do any other which may ensue on the doing it. In Larceny the Jury have a Power, as it were, of shewing Mercy to a Criminal, where the Crime is small, or it is his first Offence, by finding the Theft under 12 d. Running away with Goods bought, shews a Felonious Intention; and they are not out of the Owner's Possession by Delivery, but on compleating the Contract. Where Persons have Goods to Use, &c. they may not steal or take them away; for they have the Use only, and not the Property. And removing Goods, discovers an Intent to steal them. Things made Tame, and not Wild, one may have Property in, and being fit for Food of Life, they are the more Valuable, to make flealing them Felony. Suspicion of Felony, should be well grounded on Arrest, because of the great Damage it does a Man's Reputation.

If a Married Woman commit Felony in Company with her Husband, the shall be excused; but if the Wife alone steal Goods without the Knowledge of the Husband, it is Felony in her. A Feme Covert cannot steal her Husband's Goods; though if she is taken away with them against his Consent, or she deliver them to an Adulterer, &c. this is Felony in him. 3 Inst. 310.

Where a Woman commits Felony with her Husband, the Law presumes it is done by his Command and Coercion, so as to Excuse her. A Feme Covert, can't steal her Husband's Goods, because what is his, is also hers; but if she is taken away with them

them by another, the Person who takes them has no Property in them, and consequently he is a Felon.

Convicts of Felony, &c. within the Benefit of Clergy, are to be transported to the Plantations for seven Years, instead of being burnt in the Hand, or Whipped. And where Clergy is taken away, they may be transported for fourteen Years, by a late Statute. 4 Geo. 1, c. 11.

This is extending Mercy with a double View; first of saving the Lives of the Criminals, and secondly of making them useful in Trade.

### felo de fe.

A Felo de se is he that commits Felony, by Kil-

I ling of himself.

Upon Conviction, a Felo de se forseits all his Goods and Chattels Real and Personal, which he hath in his own Right; and all such Chattels Real which he hath jointly with his Wise, or in her Right. 3 Inst. 55. But the regularly all the Personal Estate of a Felo de se is forseited to the King, yet if such a Felon hath due unto him a Debt upon a Simple Contract, without Specialty, it shall not be forseited to the King; for then the Party would be rebutted from Waging his Law. Dyer 262.

And in other Cases, the Forseiture of Felo de se is often Times remitted, on the Coroner's Jury

finding their Verdict Lunacy.

For a Man to Murder himself is a great Crime, being committed against the Law of Nature. And as the King has an Interest in his Subjects, for his Safety and Defence, they may not Kill themselves, without incurring Forseiture of Goods. But this

Forfeiture is generally faved, by Bringing in the Person in Non Compos Mentis, which our Law supposes every Man to be, who commits self-Violence.

# Fines and forfeitures.

THE Word Fine, in a criminal Sense, signifies a pecuniary Punishment or Recompence, for an Offence committed against the King and his Laws. And Forfeiture is the Effect of Transgreffing some Penal Law; as of Life, Member, Lands,

Goods Oc.

Our Statutes are many of them very Penal in the Imposing of Fines: And where the Law doth not Impose them, as for Crimes or Misdemeanors under Treason or Felony, the Judges have an Arbitrary or Discretionary Power of inflicting them. By Magna Charta, it is enacted, That for a small Fault, a small Punishment is to be inflicted; and that even for great Ones, a Man is not to be A-

merced fo as to be destroyed. 9 H. 3. c. 4.

As to Forfeitures for High Treason, the Criminal forfeits to the King all his Lands, Tenements and Hereditaments, Goods, Chattels, &c. For Murder Lands are forfeited; Manslaughter, Chancemedley, and Se Defendendo, a Forfeiture of Goods is incurred: And what occasions Casual Death, as a Horse, Cart, &c. is also forfeited to the King. For Felony, where a Tenant in Fee, &c. commiteth it, the King shall have Year, Day and Waste in his Lands, and afterwards it comes to the Lordby Escheat; and Goods and Chattels of the Offender are forfeited. For Petit Larceny, Flight in Felony, &c. Goods are forseited.

The Forfeitures in criminal Cases are on Conviction before Judgment, by Verdict, Confession, &c. or Attainder upon the Judgment given upon the Verdict, Confession, &c. or on Outlawry or Abjuration. Go. Lit. 390.

If one commits Treason, and dies before Attainder, by Confession, or Verdict, he forseits nothing: And if one is slain in open Rebellion, he shall forseit Nothing, if not Attainted by Act of

Parliament. 3 Inft. 12.

A Woman shall have her Dower unforseited, in all Cases, except for Treason; and even in such Case her Jointure, notwithstanding the Treason of her Husband.

The Transgression of Laws, where the Offence is not Capital, requires some Punishment, either Pecu-niary of Corporal; and our Laws so much regard the Liberry and Welfare of a Man's Person, that they incline to the former; but Fines are to be proportioned to the Offence and Circumfrances of the Offender, and the Law inflicts not Ruin as a Punishment. The Forfeitures for Capital Offences, indeed are Reasonable, because as the Criminal is adjudged Unworthy of Life, so he is of Consequence of his Estate, which is for the Support of it. And the Life of an innocent Man, being precious in the Eye of the Law, there is no Killing whatfoever, even in one's own Defence, without a Forfeiture annexed to it; and of the very Thing that occasion'd the Death. Attainder of Treason makes the Forfeiture, for till then the Crime is not proved and determined. Tho' a Woman shall forteit Dower for the Treason of her Husband, the shall not her Jointure, because it is usually settled in Consideration of her Fortune.

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# fines and Recoberies.

A fine is a Covenant made before Justices, entered of Record for Conveyance of Lands, Tenements and Hereditaments. And a Recovery is Fillio juris, a formal Act by Consent, used for cutting off an Estate-Tail, &c. in Lands or Tements, to the Intent the Person suffering it, may Sell, Give or Dispose of the same at his Pleasure: Or it is a Record of Lands conveyed by Way of

better Assurance.

Fines are single or double; single where an E-state is granted, and nothing rendered back; and double, which contains a Grant, or render back again from the Cognisee to the Cognisor of the Land it self, or some Rent out of it, &c. and there are various Kinds of them; but a Fine sur Cognisance de Droit come ceo, &c. is the Principal, and esteemed the surest Kind of Fine, for it gives present Possession to the Cognisee, so that he needs no Writ of Habere facias Seismam for the Execution of it; and the Estate is thereby in Law in the Cognisee, to such Uses as are declared in the Deed to lead the Uses thereof: It implies in it Livery and Seisin; and is a Feossiment upon Record. 2 Inst. 36.

There are also Fines by the Common Law and Statute Law, with and without Proclamations: The Fine by Statute, with Proclamations, being the best Sort, and most commonly used. Fines may be levied by Tenants in Fee-simple or in Tail, &c. of all Things in ese tempore finis, which are certain and inheritable: But Fine, what Uses and what Estate a Man will, may be raised and created; and almost any Kind of Contract may be made and ex-

preffed.

pressed. When a Feme Covert levies a Fine with her Husband, she must be examined in Private, whether she does it voluntarily. Privies in Blood, as Heirs of the Cognizors, claiming by the same Title that their Ancestors had, are barred presently; but Strangers to Fines, such as are not Parties nor Privies, have sive Years Time to enter and claim their Right, &c. The like Time have Infants after their sull Age, Feme Coverts after the Death of their Husbands, Prisoners after their Enlargement, &c. And no Fine bars any Estate which is not devested and put to a Right. 2 Inst. 519. 10 Rep. 96. Plowd. 367. Stat. 1 R. 3. 4 H. 7.

By a Fine the Heirs in Tail are barr'd, and not the Reversions or Remainders; but a Recovery bars them all. Recoveries are much favoured by the Law, and they suppose a Recompence in Value to all Persons that lost the Estate; for there is a colourable Suit, a Demandant and Tenant, &c. and Judgment is entered, that the Demandant, against whom there is no Desence, shall Recover

the Land, &c. Shep. Touch. 33. 5 Rep. 40.

A Common Recovery is either with fingle, double, or treble Voucher, and bars accordingly. If there be Tenant for Life, Remainder in Tall, Remainder or Reversion in Fee; and Tenant for Life is impleaded by Agreement, and voucheth Tenant in Tail, and he vouches over the common Vouchee, this shall bar the Remainder and Reversion in Fee, though he in Remainder, &c. did never assent to the Recovery. 1 Rep. 15. 3 Rep. 60.

But if Tenant for Life alone suffer a Recovery without the Consent of him in Remainder, it is no Bar. And if Tenant for Life suffers a Recovery by Covin, it is a Forseiture of his Estate, and he in Reversion may enter presently. Also all Reco-

G 3 veries

veries had by Agreement of the Parties by Covin, against Tenants in Tail after Possibility of Issue extinct, Tenant by the Curresy, or for Term of Life, &c. shall be void against them in Reversion or Remainder, and their Heirs, &c. Stat. 14 El. c. 8. Cro. El. 670.

A Recovery bars only where there is Privity in Law; as the Issue, and he in Remainder, Reversion, &c. it shall not bar the Heir who claims as a Purchaser: And a Stranger is not barred by a Recovery, and Non-claim, as by a Fine. 3 Rep.

5. Lutw. 1224.

Fines and Recoveries may be avoided for Error, Fraud, Deceit, &c.

Fines and Recoveries, being Conveyances on Record, are more effectual in their Operation than other Conveyances; and Fines with Proclamations, are the most Solemnly passed, wherefore they are the best. As a Fine is a Conveyance, any Contract may be made in it: But the Law hates all Compulsion, fo that as a Woman is under the Power of her Husband, the is to be examined on passing of a Fine, if she is not com-pelled to it. An Estate must be put to a Right, before it can be barred by Non-claim; for till then a Man hath no Right to Claim Recoveries are favoured, because many of the Inheritances of the Kingdom depend upon these Assurances; and they bar the Islue in Tail, and all that are in Reversion and Remainder, as they suppose a Recompence in Value. There must be a Horm of Voucher, &c. to make the Bar effectual: And Persons may not Grant upon Record a greater Estate than they have, without incurring Forsei-ture. The Justice of these Recoveries is sufficiently explain'd under Tail.

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by Covin. It is selently one on the

# flight.

Light is where it is found by Inquisition that a

Person fled for Felony, Oc.

And if a Flight be found on an Indictment of Felony, or before the Coroner, in Case a Man be killed, the Offender shall forseit all his Goods and Chattels, which he had at the Time of the Indictment, to the King or Lord of the Manor: And it has been held, notwithstanding he is acquitted, he is to sorfeit his Goods; but the Flight must be found on Record. 3 Inst. 218. 5 Rep. 109.

No one not Guilty of a Crime ought to fly from or be afraid of Justice; for Flight denounces a Man conscious of Guilt, and is a Sort of Self-Accusation in the Person flying, which no Dread or Fear should permit or occasion.

# fozeible Entry.

Forcible Entry is a violent actual Entry into Houses or Lands. And a Man may commit Forcible Entry in Respect of the Armour or Weapons which he hath, or of his coming with a great-

er Number of Servants than usual.

Forcible Entry into Houses, Lands, &c. was no Crime by the Common Law, where one had Title, and his Entry was lawful. But by 5 R. 2. none shall Enter into Lands and Tenements, but where Entry is given by Law, and in a peaceable Manner, tho they have Title of Entry, upon Pain of Imprisonment, &c. Where Forcible Entry is committed, Justices of Peace are to view the Place, imprison the Offenders till they pay a Fine, and cause G.

the Lands to be reseised and restored; but not enquire into the Title of either Party, &c. Action of the Case may be likewise brought for Forcible Entry, and treble Costs recovered. Dalt. 312. 2 Inst.

257.

If one enter into the House of another, without his Consent, altho' the Door of the House was open when he entered, yet this is a Forcible Entry, if he detains the Possession from him. In Bar to Restitution on a Forcible Entry, the Desendant ought to plead he was in peaceable Possession three Years before the Inquisition sound: And Possession without Title is a good Plea in Forcible Entry to bar Restitution. Cro. Car. 201. Raym. 85.

Where an Indicament of Forcible Entry is quashed, the Court upon Motion, will grant the Party indicated a Writ of Re-restitution, to restore him to the Possession of the Land; and the Court wherein prosecuted may settle the Possession of the Land

in Question. Mic. 22 Car. B. R.

But a Writ of Restitution is not properly to be granted, but in such Cases where the Party cannot be restored by the ordinary Rules and Course of Law. 2 Lill. Abr.

Force of all Kinds is unlawful; the Law is to do Right, which can best Judge of Right, not private Men, who are generally ignorant of it, and Partial to their own Interests. Possession without Title may be maintain'd against Forcible Entry, because it is uncertain to whom it belongs by Law. Entring into a House, and Staying there, is a Forcible Entry, as it is against the Will of the Possession. The Court usually, on quashing Indictments, makes Rules to settle the Possession, where they conceive there is the most Right. But where ordinary Remedies may be had, extraordinary, as Writ of Restitution, & are not to be resorted to.

Fozgery.

#### forgery.

Porgery signifies a fraudulent Making and Publishing of False Deeds or Writings, to the Pre-

judice of a Man's Right.

It is an Offence created by Statute. By 5 Eliz. If any Person shall falsly Forge any Deed or Writing, to the Intent the Inheritance of Lands may be defeated or charged, or the Title troubled, Oc. he shall pay double Costs and Damages to the Party grieved, be set on the Pillory, lose both his Ears, and have his Nostrils slit; also forseit the Issues of his Lands, and suffer Imprisonment during Life: And Forging of a Leafe for Years, Obligation, Release, &c. the Offender shall pay double Costs, stand in the Pillory, and be imprisoned for a Year. The fecond Offence of Forgery is made Felony without Benefit of Clergy. Vide the Statute. And Forging any Deed, Bond, Note, Oc. with Intent to Defraud any Person, is made Felony, excluded Clergy, for every Offence, by Stat. 2 Geo. 2.

Forging Bank-Bills, Exchequer-Bills, Lottery-Orders, Cc. is Felony without Benefit of Clergy.

8 0 9 W. 3. 7 Ann. Oc.

Forgery ought to be a capital Crime; for when attended with Perjury, which generally goes with it, it may deprive a Man of his Estate; and without it, defraud a Person of great Sums of Money; and great Frauds should be punished as Thest, their Consequence being the same; tho till the late Statute was made, it was only for a second Offence, which in all Cases aggravates the Crime. The Forging of Bank and Exchequer Bills, &c. is made Felony to Support their Credit, and thereby the Publick Credit of the Kingdom.

Fore-

# Fozestallers, Ingrossers, and Res

Forestaller is one that buys Corn, Cattle, Victuals or Merchandise, by the Way as they come to Market to be fold, before brought into the Fair or Market, in order to fell again at a higher Price. And Persons which disswade the Owners of fuch Goods to bring the same to Market, or when there, perswade them to advance the Price, are Forestallers. An Ingrosser signifies in our Law, a Man that buys Corn, Grain, Butter, Cheefe, or other dead Victuals, with Intent to fell the fame again for unreasonable Profit, and doth sell them accordingly. And a Regrator is one that in open Fair or Market, doth buy and get into his Hands any Grain or other Victuals, and fell the same again in the same Market or Place, or in some other within four Miles. Stat. 5 & 6 Ed. 6. c. 14.

Offenders of this Nature are punished for the first Offence, by two Months Imprisonment, and Loss of the Goods or the Value. For the second Offence shall be imprison'd for six Months, and sorfeit double the Value of the Goods; and for the third Offence incur Imprisonment during the King's Pleasure, Forseiture of all Goods and Chattels, and Judgment of the Pillory. 5 6 6 Ed. 6.

c. 14. 3 Inft. 196.

The Inhancing the Price of Victuals by Forestallers is a great Offence, because thereby our Poor, who are useful in Trade, are diffress d, and sometimes famish'd. And it is for this Reason the Magistrates of most Countries have a Power of assessing and regulating the Prices of Victuals. Any one bringing Victuals or other Merchandise into the Kingdom.

dom, may fell them in Gross; but the Buyer cannot do so, because it would inhance the Market. And by Regrating, Goods and Victuals are made dearer, as every Seller will make some Profit, to the Oppression of the People; and therefore these Offences are punishable.

#### Franchites.

Ranchife is sometimes taken for a Privilege or Exemption from ordinary Jurisdiction; but more usually for some Immunity granted to a Cor-

poration, Oc.

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When the King grants any Franchises, which were such in his own Hands, as Parcel of the Flowers of his Crown, such as Goods of Felons and Fugitives, Wreck of the Sea, &c. if these come again to the King, they are drown'd in the Crown, and he hath them again in Jure Corona: But when a Liberty or Franchise, &c. was at the first Erected and Created by the King, and was no such Flower of the Crown; as a Fair, Market, Hundred, or the like, they are not Extinct or Drown'd by the Accession of them again to the Crown; nor is the Appendance of them severed from the Possession. 7 Rep. 10. Dyer 108.

It hath been adjudged that Grants of Franchises made before the Time of Memory, ought to have Allowance in B. R. &c. within Time of Memory, or they shall not be Records pleadable: But Franchises granted within Time of Memory, are pleadable without any Allowance or Confirmation; and if they have been allowed, they may be claimed without shewing the Charter, &c. 2 Inst. 281.

9 Rep. 27.

By the Statute of Magna Charta, the City of London, and all other Towns, Cities, &c. are to have

have their ancient Liberties and Franchises. 9 H. 3. c. 37. But no Franchise shall be allowed where the Franchise doth fail to administer Justice within the same; though if there be such a Failure, the Court of King's Bench may compel them to do Justice. Mich. 22 Car. B. R. 1 Lill. 635.

Where the Privileges of a Franchise are abused, upon a Quo warranto brought, it is a Forseiture.

Particular Franchises are derived from the Crown, tho' general Laws and Liberties are not. Privileges originally in the Crown before granted, are Drown'd by their coming again into the King's Hands, because they are then the same as before, and no Privilege to the Subject: But Things newly Created by the King, not in Esse before, Time and Usage makes them Appendant, and they shall remain. Privileges and Franchises are not granted to protect Men in Neglecting to do Right, or to do Wrong; and it is the Business of the Court of King's Bench to see Justice duly administred.

#### frauds.

Raud is Deceit to a Man's Damage, whether in Bargains and Sales of Goods, or in Grants and Conveyances of Lands. And for Deceits in Contracts, Bargains, Sales, Oc. of Goods, Action of the Case lies for Damages. Danv. Abr. 32.

Comp. Attorn. 132, Cc.

Deeds of Gift, Grants, Devises, &c. of Lands fraudulently made to defeat just Creditors, and Purchasers, &c. are void. A Presentation obtain'd by Fraud, is void: Letters of Administration procured by Fraud, are also void; and Sale of Goods by Fraud, altho' it be in open Market, shall not be Binding. 13 & 27 Eliz. 1 Vent. 329.

Frauds and Deceits are relieved in Chancery, where no Remedy is to be had at Law. If a Man conveys his Land to Friends in Trust, or to the Use of a Wife for her Jointure, &c. to destraud a Purchaser, the Trust shall go in Equity to the Purchaser, and he shall avoid the Estate; also it shall be liable for Debts. Tothil. 44. 6 Rep. 73. A general Gift of all a Man's Goods, may be reasonably suspected to be Fraudulent, though there be a true Debt owing to the Party to whom made: And such a Deed is void against other Creditors. 3 Rep. 80.

In some Cases, fraudulent Deeds are good against the Makers, by Statute; as to Multiply Votes at Elections, with a Power of Redemption,

erc. Stat. 10 Ann.

Our Laws abhor Fraud: They are defigned for the Advancement of Truth, and Suppression of Fraud; so that whatsoever is done or obtained by Fraud, is unlawful and void; and wherever any Persons are injured by it, they shall have Recompence. Creditors are to be paid their Debts by Law, and Purchasers secured in their Purchases against Fraud: But some fraudulent Deeds may be allowed to be good, as they are a Punishment to the Makers. The Chancery is the best Court for sisting of Frauds, because it is not ried down to the strict Rules of the Common Law.

The Statutes made to suppress Fraud and Deceit, fhall be taken and interpreted beneficially: And by all the Acts of Parliament made against Fraud, the King is bound, tho' he be not specially nam'd. 5 Co. 14.

It is reasonable that Acts should be beneficially Construed, against Fraud and Injustice: And that the King should be bound by them, because Truth and Justice are the Supports of his Crown.

Freeholds.

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# freeholds.

Reehold is that Land or Tenement which a Man holds in Fee, Fee-Tail, or for Life. It is likewise extended to such Offices as are held ei-

ther in Fee, or for Life.

It is the highest Estate, and hath certain Privileges appeared to it beyond any other; as a Freehold of 40 s. a Year Qualifies a Man to Vote in the Election of Knights of the Shire: A Freehold of 10 l. per Ann. gives a Person the Privilege of Serving on Juries. A Person must have an Estate of Freehold, or Copyhold, of 600 l. a Year, to be Qualified to be chosen Knight of the Shire; and 300 l. per Ann. to be a Burgess in Parliament. Vide Statutes 8 H. 6. c. 7. 4 6 5 W. & M. c. 24. 9 Ann. c. 5.

An Estate for one Thousand Years, is not a Freehold, or of so high a Nature, in Construction

of Law, as an Estate for Life, 1 Inft. 6.

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A Freehold is a Noble Estate from its very Name, To hold Free; and as it is an Estate beyond all others to render a Man Considerable, it is reasonable it should have Privileges beyond others, and be made a Qualification for Freemen to do certain Acts, and enjoy a Share in the Administration. An Estate for Life is Superior to any Term of Years, because it is a Freehold, and exempt from Services to which a Term is generally liable; and by the Common Law Tenant for Years is under the Power of Tenant of the Freehold.

#### frem Suit.

FRESH Suit or Pursuit, is a Present and earnest following of the Offender, where a Robbery is committed, that never ceaseth from the Time of the Offence done, until he be apprehended.

And when an Offender is thus apprehended, and Indictment brought against him, upon which he is Convicted of the Felony, the Party robbed shall have Restitution of his Goods; and though the Party robb'd do not apprehend the Thief presently, but that it be some time after the Robbery, if the Party did what in him lay to take the Offender, and if in such the happen to be apprehended by some other Person, it shall be adjudg'd Fresh Suit. Terms de Ley 362.

If no Fresh Suit is made by the Party robb'd, the Goods stolen are forseited to the King.

On Fresh Suit, Restitution of Goods is allowed as an Encouragement to bring Offenders to Punishment: And was not a Person robbed to take all reasons ble Care in Inquiry after and pursuing the Robber, it would seem as if he tacitly yielded to the Robbery done,

There is also a Fresh Suit when a Gaoler immediately pursues a Felon or other Person escaping from Prison, which he may do into another County. So where a Tenant pursues his Cattle that escape or stray into another Man's Ground, Or

A Gaoler retaking his Prisoner escaping in Time, shall be excused for his Diligence.

Gaols.

#### Baols.

A Gaol is a Place for imprisoning Offenders against the Laws, and confining of Prisoners for Debt.

Every County is to have a Common Gaol in good Repair, or the County shall be fined. And Sheriffs of Counties are to have the Keeping of the Common Gaols; except such as are held by Inheritance, the King's Bench and Marshalsea, &c.

19 H. 7. c. 10.

Grants made by the King of the Custody of Gaols of Counties are void; for the Custody of Gaols of Counties of Right doth belong, and by Law is incident to the Office of Sheriffs, who are to put in such Gaolers for whom they will be answerable. 4 Co. 34.

Gaolers suffering Felons wilfully to Escape, are

Guilty of Felony, Oc. Plowd. 476.

Gaols are necessary to keep Offenders in Safety till tried and punished by Law; and Sheriffs of Counties, who execute the Laws, in Subordination to the Crown, are the proper Officers to have the Custody of them. Gaolers are to be answerable for their Prisoners; for otherwise, by Escapes, Justice would not be done on Breakers of the Laws.

Saming.

#### Gaming.

Aming is a playing at Tables, Dice, Cards, &c. And in the 28th Year of King Hen.

8. Proclamation was made against all unlawful Games, and Commissions awarded into the several Counties of England for the Execution thereof.

By the Stat. 33 H. c. 9. Justices of Peace, &c. are impowered to enter Houses suspected of unlawful Games, and to arrest and imprison the Gamesters till they give Security not to Play for the Future. And the Persons keeping unlawful Gaming-Houses, may be committed by a Justice, until they find Sureties not to keep such Houses; who shall forseit 40 s. and the Gamesters 6 s. 8 d.

The Statute 16 Car. 2. c. 7. gives treble Damages against Persons who shall win any Money by Fraud or Deceit at Cards, Dice, Tables, &c. and also enacts, that if any Person shall play at Gaming, not for ready Money, and lose 100 l. or more, his Security taken for it shall be void, and the Winner forseit treble Value. And by 9 Ann. c. 14. if any Person lose by Gaming at one Time 10 l. he may recover the same from the Winner, by Action of Debt; and winning so much by Fraud, shall forseit five times the Value, &c.

Persons having no visible Estates, not making it appear that the principal Part of their Maintenance is got by other Means than Gaming, are to be bound to the Good Behaviour. Stat. 9 Ann.

Gaming-houses, by our Law, are adjudged a Common Nusance, and the worst of Nusances, not only because they are great Temptations to Idleness, to the Neglect of all Manner of Industry, but as they draw together great Numbers of disorderly

#### The Student's Companion: 98

orderly Persons, to the Disturbance of the Neighbourhood: And it is highly reasonable that Gamefters and Sharpers should be hindered from making any Advantage of their Frauds and fubtle Devices. to draw in and entice young Gentlemen to their Ruin.

#### Gabelkind.

Aveikind fignifies a Tenure or Custom annexed and belonging to Lands in Kent, whereby the Lands of the Father are equally divided at his Death, among all his Sons; or the Lands of a Brother among all the Brethren, if he have no Iffue of his own; and the Wife shall be endowed of Half the Lands whereof her Husband died feifed. during her Widowhood, Oc. Also the Heir, at the Age of Fifteen Years, may give and fell Gavelkind Lands; and though his Father be Attaint of Treason or Felony, he shall Inherit. Lit. 210. 1 Co. Inft. 140.

It is faid that all the Lands in England were of the Nature of Gavelkind, before the Conquest, and descended to all the Issue equally; but after the Conquest, when Knight-Service was introduc'd. the Descent was restrained to the eldest Son. Lamb. 167. And by the Stat. 31 H. S. c. 3. great Part of the Customary Lands of Kent is made descendible to the eldest Son, according to the Course of the Common Law.

In the Time of our Saxon Ancestors, the Inheritance of Lands descended to all the Sons alike, as the most natural Disposition of it, from whence came the Custom of Gavelkind: And the Reason why this Custom was retained in Kent, is because the Kentishmen were not conquered by King Will. 1. but infifted upon and preserved their Liberties. And

And the general Custom of Gavelkind was alter'd to Descend to the eldest Son, for the Preservation of the Tenure, and the Support of Families.

#### Bifts.

A Deed of Gift passeth either Lands or Goods, I and is good without any Confideration; but Care must be taken that there be no Fraud in thefe Deeds.

A Gift may be by Word, as where a Person says to another, Here I give you this Ring, &c. and delivers it accordingly, as well as by Deed: And there is a Gift in Law; when a Man marries a Woman, the Law gives all the Goods of the Wife to the Husband, by the Marriage. And if a Perfon be made Executor of a Will, the Law gives him the Testator's Goods. 1 Inst. 351.

A free Gift is good without Confideration, as it is frongly implied therein, and differs from a Contract where fomething is to be done on either Side. BedGift in Law, is by Construction of Law, and is as it were Conditional to a Husband or Executor; because they are liable to the Debts of the Wife and Teffator.

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Grant is a Conveyance or Gift of fuch Incorporeal Things as lie in Grant, and not in Livery; and cannot be given or granted by Word only, without Deed.

There are certain Persons incapable by Law to make Grants; fuch as Attainted Perfons, those who are Non Jana Memoria, Infants, Feme Coverts, Oc. But a Person Attainted of High Trea-

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#### 100 The Student's Companion:

fon, or Felony, may make a Deed of Gift or Grant, and be Good against all Persons but the King, and the Lord of whom the Lands are held; and for his Relief in Prison, they will be good against them too. Grants made by Persons Non Sana Memoria, are good against themselves, but voidable by their Heirs, Executors, &c. Infants may be Grantees, the when they arrive at Age, they may either Agree or Disagree to the Grant: And a Woman Covert may take by a Grant, so as it shall be Binding, if the Husband do not Disagree to it. Co. Lit. 2. Perk. Sell. 4, 26, &c.

A Grantee himself ought to take by the Grant immediately, and not a Stranger, or any one in futuro. In Grants there must be a Foundation of Interest, or they will not be good: And the Law will not allow of Grants of Titles, or Impersect Interests; or of such Rights as are meerly Future.

Bac. Max. 58.

If a Man grant to another Timber-Trees, the Grantee may come upon the Ground, to cut them down, and carry them away, thro' the Grantor's Land. Plowd. 15.

Attainted Persons may make Grants for their Relief in Prison, for every Man's Estate is to maintain him. The Grant of a Person Non sana Memorie, may be good against him as 'tis his own A&; but not against his Heirs, &c, who are injured by it, not lawfully made. Where an Infant is Grantee, the Law presumes it is for his Advantage, but he has till his Age to Judge of it. Grants ought to be immediately Executed, for the Certainty of them; and the Grantee himself is to take, because the Grant is made to him. A Grantor must have an immediate Interest in the Thing granted, by Reason it is uncertain whether a future Interest will ever happen to him, wherein he hath only a Possibility. If a Grantee of Timber

#### Dr. The Reason of the Law.

Timber-Trees could not come on the Land to cut them, he would have no Benefit from his Grant.

#### Guardians.

Guardian fignifies most commonly he that hath 1 the Education or Protection of Children, who are not of Discretion to guide themselves.

We have three Sorts of Guardians in England: one Ordained by the Father in his Last Will; another appointed by the Judge afterwards; and the Third cast upon the Minor by the Law and Cufrom of the Land. 1 Inft. 88. But the ancient Law in this Case is in a great Measure altered by the Stat. 12 Car. 2. c. 24. which hath taken away the Court of Wards and Liveries; and ordains, that where any Person hath any Child or Children, under twenty-one Years of Age, and not married at the Time of his Death, the Father of fuch Child or Children, by Deed executed in his Life-time, or by his Last Will and Testament. may Dispose of the Custody and Tuition of such Children as he thinks fit, (to Persons not Popish Recufants) until they come to the Age of one and twenty, Oc. which was formerly in the Court of Wards. 12 Car. 2.

And in Case the Father appoint no Guardian to his Child, the Ordinary may appoint one to order the Moveables and Chattels until the Age of fourteen Years, and then he may chuse his Guardian: And for his Lands, the next of Kin on that Side by which the Lands descend not, shall be Guardian, as heretofore in Case of Tenure in So-

cage. 1 Lill. 657.

#### 102 The Student's Companion:

Guardians are Accountable for Profits, &c. And Account lies against the Executors and Administrators of Guardians. 465 Ann.

As the Law provides against all Things; so where Persons want Discretion, for Management of their Assairs, it takes Care to appoint those to act for them which have Discretion, that they may not suffer in their Estates. And the Father hath the Disposition of his Children for his Satisfaction herein; which if he neglects to do, it is reasonable some Body should appoint for him till the Age of Discretion; and that then the Child should be at Liberty to chuse for himself. But of his Lands, the next of Kin on that Side the Lands descend, may not be Guardians, because they are next Heirs to the Minor, and may be supposed not to do him that Justice as other Kindred, as they have an Interest in his Death.

#### Dabeas Corpus.

In Abeas Corpus is a Writ, which a Man indicted for a Trespass before Justices of Peace, &c. and imprisoned for it, having offered sufficient Bail, which is resused, may have out of the King's Bench, thereby to remove himself thither, and answer the Cause there. A Habeas Corpus also removes a Person and Cause from one Court and Prison to another; as where a Person is arrested, and cannot procure Bail, he may remove himself by Habeas Corpus to the Fleet, or King's Bench Prison, and have the Benefit of the Rules of those Places. F. N. B. 250. 2 Inst. 53. 4 Inst. 182.

The Writ of Habeas Corpus was originally ordained by the Common Law of the Land, as a Remedy

Remedy for such as were unjuftly detained in Prifon, to obtain their Liberty; but the Judges pretending to have Authority either to Grant or Deny it, (especially where the Party was a State Prisoner) and the Gaolers misusing their Power, to prevent these Abuses the Stat. 31 Car. 2. was made and enacted: which ordains, that Persons detained in Prison for any Thing (except Treason or Felony express'd in the Commitment) may by Habeas Corpus, in Vacation Time, be brought before the Lord Chancellor, or any Judge, and be discharged upon their entering into a Recognizance, with one or more Sureties, for Appearance in B. R. the next Term, or at the next Affiles for the Place where the Commitment was, unless the Party be secured for Offences not Bailable, &c. The Lord Chancellor, or any of the Judges, denying a Habeas Corpus, shall forfeit 500 l. And the Officer refuling to obey it, 100 !. for the first Offence, and 2001. for the fecond, &c.

Persons committed for Treason, Oc. expressed in the Warrant of Commitment, upon Prayer in open Court, the first Week of the Term, or Day of the Sessions, shall be brought to Trial: If not indicted the next Term or Sellions, upon Motion the last Day of the Term, &c. they shall be let out on Bail, unless it appear the King's Witnesses are not. ready: And if they are not tried the second Term or Sessions, Oc. they shall be discharged. Stat.

Thid.

A Prisoner for Debt, who is not in Execution, may be brought out of Prison by Habeas Corpus, to be a Witness at a Trial; but the Party that fues out the Habeas Corpus must, at his Peril, take Care the Prisoner do not Escape. 2 Lill. 3.

#### 104 The Student's Companion :

Habeas Corpus may be granted by the Court of B. R. or any Judge at his Chamber, for any Private Person, kept against his Will, in the House or Custody of another. 2 Lill.

The Subjects of England are entitled to Liberty; and their very Nature requires it: For it hath been observable, that with it no People on Earth have more Courage in War, are more Adventurous in Traffick, or more Industrious in Arts and Sciences than the English; but without it we are a Poor Dejected Spiritless People. It is therefore both our Common and Statute Laws, have given us the Benefit of the Habeas Corpus Writ, which is one of our most valuable Privileges, as it relieves Persons from Prisons and Dungeons, and the Hands of cruel and merciless Men. Indeed our Habeas Corbus Act has been sometimes suspended; but this has been seldom done, and is only practifed when the State labours under great Convulsions. A Prifoner may be brought out of Prison to be a Witness for the Facilitating and Accomplishing of Juflice. And no Person, not Criminal, shall be detained in the Custody of another, because all Englishmen have a Right to Liberty.

#### Beir.

A N Heir is he that succeeds by Right of Blood, in any Man's Lands or Tenements in Fee. But one cannot be Heir till after the Death of his Ancestor; before he is called Heir Apparent: And by the Common Law a Man cannot be Heir to Goods and Chattels.

He is a lawful Heir whom Marriage demonstrates to to be. A Bastard cannot be Heir to any; but having acquir'd a Name by Reputation, he may purchase Lands, take a Remainder, &c. An Alien

may

may not be Heir, tho' born in lawful Wedlock; nor may an Alien purchase any Lands in England. An Hermaphrodite may be Heir, and take according to that Sex which is most prevalent; but a Monster that hath not Humane Shape, cannot be Heir: Ideots, Outlaws in Debt, Persons Excommunicate, Oc. may be Heirs. Braff. 91. 1 Inst. 8.

It is a Maxim in the Common Law, that the Heir shall never be bound by any Warranty, but where by the same Warranty the Ancestor was bound, without which it cannot descend upon the Heir: As if a Man make a Feosfment in Fee, and bind his Heirs only to Warranty, this is void: And if in an Obligation a Man bind his Heirs to pay a Sum of Money, but not himself, the Obligation is void. Co. Lit. 386. Cro. Jac. 570.

Where a Rent-Charge is granted to a Man and his Heirs, the Grantee shall not have Writ of Annuity against the Grantor's Heir, unless the Grant be for him and his Heirs, altho' there be Assets: And by the Grant of an Annuity, an Heir shall not be bound, tho' named, except there be Assets.

Co. Lit. 144.

If a Man bind him and his Heirs to pay a Sum of Money at a certain Day, and dieth, the Obligee may fue either the Heir or Executors of the Obligor; who have Assets in their Hands: And if the Executors have Assets, yet may the Obligee sue the Heir, who is bound by the Bond. But in this Case the Heir may plead Riens by Descent. Plowd: 440.

The Heir at Law is favoured by the Law: An Heir shall inforce the Administrator to pay Debts with the Personal Estate, to preserve the Inheritance. He is no longer chargeable than he hath Asset: And where an Heir is sued for his Ancestor's Debt, his Body shall not be taken in Execu-

#### 106 The Student's Companion:

tion, or any other Lands which he had not by Difcent; but if he do not shew what Lands he had by Discent, and plead truly, it shall be intended that he had Assets to pay the Debt, &c. Moor

522. 3 Salk. Rep. 179.

When a Man recovers against an Heir, a Special Judgment de Terris Descensis may be entered. Davis 439. And if the Heir has made over the Lands fallen to him by Discent, Execution shall be had against him to the Value of the Land, &c. if it be not sold bona side before the Action brought. Stat. 3 & 4 W. & M. c. 14.

The Word Heirs includes Affigns in Grants, oc. and under this Word, the Heirs of Heirs are

comprehended in infinitum. Noy 56.

Heirship remains in a Man's Self during his Life, and ought to be of Lands in Fee, which are Lafting as Posterity, and not of Goods that are Perishable. Bastards are excluded to be Heirs, or to take as Issue, because it is uncertain whose Children they be; but a Bastard, in Time, being known by Reputation, who he is, which makes a kind of Certainty, may take a Remainder, make a Purchase, &c. An Alien may not be Heir to Lands, because he can have no Right of Birth nor shall he Purchase here, because thereby Part of the Lands of this Realm might be under the Power of a Foreign Prince; for a Man's Person and Estate are in some Sort Subject. A Monster may not be Heir to any; he cannot represent a Humane Creature, and an Heir is alter infe, a fecond Same. A Man cannot bind his Heir, without binding himself, any more than he may bind another to do an A& for him, who is not obliged to it without Confideration. An Heir is to be Named to be Bound, because he is favoured in Law; and Affets only make him Answerable, asthey enable him to perform the Grant of his Ancestor. No one ought generally to be taken in Execution

#### De The Reason of the Law. 107

Execution for any Debt not his own; but for Fraud in making over Lands, &c. it is reasonable that Heirs and others should be liable.

The Common Law of England so much sayours Heirs, that by it the Ancestor could not convey away his Lands by Will, upon his Death-Bed, without the Consent of the Heir at Law. Hil. 23. Car. B. R.

A Son and Heir is Part of his Father, and tho' the Father be dead, yet he is as it were not dead, because he hath left his Like, to sit in the Seat of his Ancestors: Wherefore the Common Law preserves the Inheritance to him. But by the Stat. 32 H. 8. of Wills, the Law is in this Point altered.

#### Petrets.

A N Heires is a Female Heir to a Man, having an Estate of Inheritance in Lands or Tenements.

And if any Person shall take away any Woman, having an Estate in Lands or Goods, that is Heir Apparent to her Ancestor, against her Will, and Marry or Desile her, the Takers, Procurers, Abettors and Receivers knowing the same, are Guilty of Felony. And if the Taking be unlawful, and against the Will of the Woman, altho' the Marriage was with her Will, it is Felony: But it is not Felony to steal a Woman, unless Marriage or carnal Copulation ensue. 3 H. 7. c. 2.

The taking away any Woman Child, out of the Custody, and against the Will of the Father, Mother, or Guardian, makes the Ostender liable to

Fine and Imprisonment. 1 P. & M.

Stealing an Heires, having Lands or Goods, and Marrying her, is a capital Crime; because it is in Consequence Thest of her Fortune, which a Man is intitled to by the Marriage; and therefore it is the Marriage chiefly makes the Crime; and the Will of the Woman is no Excuse to the unlawful Action: But this Law hath a further Regard to the Preservation of Families. No Persons are to be taken away by Force, as the Law will suppose Children to be, from their Places of Habitation.

#### Homage and fealty.

HOmage is a Submission by Tenants of Obedience to their Lords.

When a Freeman doth Homage to his Lord, he shall hold his Hands between the Hands of his Lord, and say thus: I become your Man from this Time forth for Life, for Member, and for Worldly Honour; and owe you Faith for the Lands I hold of you, &c. And Fealty of Tenants is an Oath of Fidelity to the Lord, to observe Customs and Services. Kitch. 131.

None shall do Homage, or receive Homage, but only such as have an Estate in Fee-simple, or Feetail, either in his own Right, or in the Right of another. But Fealty may be done by Tenants by

Copy of Court-Roll, Oc.

By our Law, a Religious Man may do Homage, but may not fay to his Lord, I become your Man.

There is a Loyalty due from Tenants to their Lords, as well as from Subjects in general to their Sovereign; and Lords of Manors are Governors within their own Territories. Homage of Tenants is beyond Fealty, for it hath more of Solemnity, and requires greater Ceremony. But a Religious

#### D2, The Reason of the Law. 109

Religious Person must not say to his Lord, Ego devenio Homo Vester, because he hath professed him-self to be only God's Man.

#### Bundzeds.

A Hundred is Part of a Shire, so called for that of Old each Hundred found 100 able Men to the King for his Wars. And this Dividing Counties into Hundreds, King Alfred brought from Germany; for there Centa is a Jurisdiction over an 100 Towns.

If a Robbery be committed on the Highway in the Day-time, of any Day, except Sunday, the Hundred is chargeable; and Day-light before Sunriling, or after Sun-set, is accounted Part of the Day. But the Party robbed must give Notice with all Speed, to the next Village, Oc. or to fome Person inhabiting near the Place where the Robbery was done; he must also be examined on Oath, before a Justice of Peace dwelling within or near the Hundred, twenty Days before his Action brought against the Hundred, and commence his Suit after forty Days, and within one Year after the Robbery committed; and then the Hundred is chargeable, if the Robbers or one of them are not taken, after whom Hue and Cry is to be made, Oc. Stat. 27 Eliz. 7. Co. Rep. 7.

Where a Robbery is begun by Day-light, but is not ended till Dark Night, yet the Hundred where it is done, is faid to be Answerable. And according to some Opinions, a Robbery shall be adjudged to be done in that Hundred where the Party is first set upon, althor his Goods be taken

from him in another Hundred. Mich. 1649.

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When a Robbery is committed upon a Sunday, or in the Night, the Hundred shall not be chargeable: And if any one of the Robbers are taken within forty Days after the Robbery is committed, and thereof is convicted, the Hundred shall be Excused. 27 Eliz. c. 13.

Counties were divided into Hundreds for better Government: And Hundreds are Answerable for the Bodies of Robbers, or to pay the Money lost; for all Persons are to be protected in Travelling on their lawful Callings, and it is reasonable they should be protected by those through whose Territories they travel. On a Sunday Travelling for Worldly Affairs is prohibited by Law, because that Day is commanded by God's Law to be set apart for the Service of Religion. And in the Night People are supposed to be at Rest from their Labours, and that they cannot make Pursuit after Ossenders. A Robbery is one continu'd Act, though ended after Night, and shall have Relation to the Beginning. Where a Man is set upon, there a Robbery is first begun, and the Peace first broken, to charge the Hundred.

#### Joeots and Lunatichs.

A N Ideot in our Law, is a Natural Fool, otherwise termed Non Compos Mentis: And a Lunatick is one Non Sanæ Memoriæ. The King has the Care and Cultody of the Lands of Ideots and Lunaticks. 17 Ed. 2. c. g.

If a Man had once Understanding, and became a Fool by Chance or Misfortune, the King shall not have the Custody of him: And if one have so much Knowledge as to measure a Yard of Cloth, number twenty Pence, rightly Name the Days of

#### Dr. The Reason of the Law.

the Week, or beget a Child, he shall not be accounted an Ideot by the Laws of the Realm. 4 Rep. 126. Deeds, Oc. made by an Ideot are voidable. or may be made void; but what Ideots do concerning Lands, &c. in a Court of Record, shall bind them: And an Ideot may contract Matrimony, Oc. 2 Inft. 483. I Roll. Abr. 257.

A Lunatick cannot Promise or Contract for any Thing; if he does, his Acts may be avoided. If a Madman commit a Murder, or Felony, unless he Kill the King, or offer to Kill him, he shall not suffer for it; but to Kill, or offer to Kill the King. is Treason in all Persons whatsoever. I Inft. 247.

4 Co. 124.

The King, by the Laws, is to defend his Subjects, their Goods and Estates, and hath the immediate Government of those who cannot govern themfelves; but a Man must be truly a Fool a Wats citate: The begetting a Child may be an Act of Understanding, as it is a Sense of Nature for the Supply of Mankind. And an Ideot may contract Marriage, because it is possible a Fool may beget a wife Man. A Lunatick can do no Act, for he understands not what he does; and he has no Will or Malice to commit Crimes: But to violate the Person of the King, is Treason in all Cases, for the Safety of the State.

## Jeofails.

TEofail signifies an Over-sight in Pleading, Oc. and is when the Parties to a Suit have gone fo far that they have join'd Iffue, which hall be tried. or is tried by a Jury, and the Pleading or Affue is fo badly pleaded or joined, that it will be Error if they proceed; then this may be shewn to the Court by the Counfel of either Party, not only before

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the Jury are charged, but after Verdict before Judgment given. The shewing of which Defects by the Counsel, was often when the Jury came into Court to try the Issue, by saying, This Inquest ye ought not to take; and if after Verdict, by saying, To Judgment you ought not to go, &c. Terms

de Ley, 401. 5 Co. Rep. 35.

These Suggestions of Defects, occasioning great Delays in Suits, there have been feveral Statutes made to help them: As the 32 H. 8. c. 30. which enacts that Judgment shall be given after Issue tried. notwithstanding any Jeofail: The 18 Eliz. c. 14. ordaining, that after Verdict there shall be no Stay of Judgment for want of Form in any Writ. Oc. or by Reason of insufficient Returns of Sheriffs, Oc. The 21 Jac. 1. c. 13. that no Judgment shall be stay'd for Variance in Form between the Original Writ and the Declaration, &c, or for want of Averment of the Parties being living, fo as the Person is proved to be in Life, or for Misnomer of Jurors, if proved to be the Persons returned; want of Return of Writs, Oc. And the 16 0 17 Car. 2. c. 8. that no Stay of Judgment shall be for Default in Form, Oc. or mistaking the Christian or Surname of either Party, Sum of Money, Day, Oc. being rightly named in any preceding Record, Oc. which Defects not against the Right of the Matter may be amended by the Judges.

See the Statute 4 & 5 Ann. c. 16. and 5 Geo. I. c. 13.

It is reasonable there should be Form and Method in Law Proceedings, or the Law would be no Art: But it is very unreasonable that by little Subtilities, Catches and Quibbles, an expensive Prosecution should be destroyed, together with the Client's Remedy: Therefore divers Laws and Statutes have interpos'd to prevent the fatal Consequences

sequences of over Nicety in Matters where the Subftance is not impeach'd: Though still there is to be Form observed in Pleadings; and for the Certainty of Persons Proof is requisite: Also the Original Process or Record ought to be presum'd Right, by which the others shall be amended and reformed.

#### Ignozance.

I Gnorance, which is want of Knowledge, of the Law, shall not excuse any Man from the Pe-

nalty of it.

Every Person is bound, at his Peril, to take Notice what the Law of the Realm is: And Ignorance of it, though it be invincible, as where a Man affirms he hath done all that in him lies to know the Law, shall not excuse him. Dott. & Stud . c. 46. 5 400 1

An Infant of the Years of Discretion is capable of committing Crimes, though he be Ignorant of the Law, and shall be punished for them as other Persons. But Infants of Tender Age have Ignorance by Nature; as Persons Non Compos have Ignorance by the Hand of God. 1 Inft. 247.

As all Laws are publish'd so as to be known to the People, and their own Laws by the Consent of their Representatives, they are to know and obey them at their Peril; and no Plea of Ignorance is allowed, which, if it were, would be the great and common Allegation for many Kinds of Offences.

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#### Impriforment.

Imprisonment signifies, where one is restrained of his Liberty, upon any Action, Civil or Criminal.

At Common Law a Man could not be imprisoned, unless he were Guilty of committing some Force: And concerning those that commit Force, the Common Law subjects their Bodies to imprisonment, as to one of the highest Executions of Law, whereby they lose their Liberty, until they have made Agreement with the Party, and Fine to the King: For which Cause it is a Rule in Law, that in all Actions Quare vi & armis, a Capias lies; and where a Capias lies in Process, there, after Judgment, a Capias ad Satisfaciendum lies, and there also the King shall have a Capias pro Fine. 3 Co. Rep. 11.

By Statute Law, imprisonment is inflicted in many criminal Cases; as for Misprison of Treason, Imprisonment for Life, &c. And for other Crimes, where no Time of Imprisonment is directed by Law, the Judges have a Discretionary Power of Imprisoning for what Time they think fit, with Regard to the Offence committed. 3 Inst.

In Civil Cases Arrest doth not aim at Imprisonment, but at Bail or Security to be given, to answer the Law, and pay the Debt or Damage: Imprisonment is generally for Custody, not Punishment.

The Liberty of a Man is of such high Esteem in Consideration of the Common Law, that Force only shall subject him to Imprisonment; for the Law abhors Force, which is contrary to the Quiet and Repose of the Kingdom, as one of her capital Enemies.

#### Dr. The Reason of the Lab.

Enemies. And as a Man's Body is a chief Agent in the Force, it is fitting it should be punish'd by Imprisonment. In other Cases of Imprisonment, it is a dreadful Punishment, introduced by Statute, to deter Men from Crimes; and but Sparingly to be inflicted in a Country of Liberty. If Imprifonment was intended by Law for a Punishment in Civil Actions, certainly the Law would limit a Time for its Duration, as in criminal Cases, and that People might know an End of it.

By the Stat. 2 Geo. 2. Persons charged in Prison in Execution for any Sum not exceeding 100 l. shall be discharged from Imprisonment by Order of the Judges, on giving up their whole Estate and Effects upon Oath to their Creditors, unless the Creditors are diffatisfy'd with a Prisoner's Oath, and agree to pay him 2 s. 4d. a Week rowards his Maintenance in Prison, &c.

This Law is founded on Humanity, and agreeable to the Laws of most other Countries.

#### Incidents.

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Source Charles and preferred . A N Incident is a Thing appertaining to, or following another that is more Worthy of subody sa all

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adjudent to him of

A Court-Baron is incident to a Manor, Court of Piepowders to a Fair, and a County-Court to a Sheriff; Imprisonment to a Fine; Deeds and Charters to Lands; Timber-Trees to the Freehold; Rents to Reversions; Covenants for Repairs to the Land; Fealty to Tenure of Lands; Distress for Rent to Fealty, &c. All which are Incidents, in Law, to the Things they belong to. Co. Lit. 151. Oc. 1

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And of Incidents, some are separable, and others inseparable; but most of them are inseparably Incident. If Lands be conveyed to a Man, the Law allows him a Way to it, without being expresly mentioned, as incident to the Grant. Kitch. 36.

Principal Things draw the Accessary: Land drawerh the Profits; a Rent-Charge follows the

Land; and Warranty the Fee.

Where a Man hath Title to the principal Thing, he shall always justify the Circumstance, and be entitled also to it, because it contributes to the Support of the Principal, which cannot otherwise subsist as it ought. And when the Law giveth any Thing to any one, it giveth implicitly whatsoever is necessary for the Taking and Enjoying of the same, without which the Gift would be fruitless.

# This law is strampionEty, and egrecalle

A N Indictment is a Bill or Declaration drawn in Form of Law, for the Benefit of the Common-wealth, exhibited by Way of Accusation against one for some Offence, and preserved unto Jurors, by whose Verdict it is found and presented to be true, before a Judge or Officer that hath

Power to punish the Offender.

It is always at the Suit of the King; and for criminal Matters: And in most Cases the Indictment for a Fact done, ought to be laid in the County where the Fact was committed; but this doth not hold in all Cases. And when the Indictment is found in the proper County, it may be heard and determined in any other County, by Special Commission, Gan 3 Inst. 27.

Indictments may be of High Treason, Petit Treason, Felony, Trespass, &c. and must set forth the

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Christian Name, Surname, and Addition of the Estate and Place of Residence of the Ossender; the Certainty of Time, when the Ossender; done, as the Day and Year, is to be expressed; (unless it be in Treason, wherein the Officers of the Crown are not bound to set down the very Day) the Nature of the Ossender must be set forth; and the Value of the Thing by which it is committed, &c. Also in Cases of Treason, Felony and Trespass, they ought to be vi Tarmis, and conclude contra Pacem. Co. Lit. 303: 2 Inst. 318.

Upon an Indictment of Murder, or Manslaughter, it is requisite to express the Length and Depth of the Wound given, except the Wound penetrate through the Body, when it is not necessary to shew

them. 5 Co. 121.

Indictments ought to be more certain than common Pleadings in Law: And may be Amended the fame Term brought into the Court, by the Clerk of the Peace; but the next Term after he cannot Amend them. If only a Word of Form be left out in an Indictment, yet the Indictment is good; but if one Word of Substance be omitted, the whole Indictment is naught: 2 Lill. 45:

An Indictment lies against one for assaulting and stopping another on the Highway; for cheating another at Play; conspiring to do an illegal Act, Oc. But if one be indicted for doing any. Thing for which he is not by Law to be indicted; as for some Trespass, for which Action is to be brought at Common Law, such an Indictment is not good, but may be quashed. I Lev. 62, 125 100 136

To call a Man Rogue, Thief, &c. is Actionable at Common Law, and Indictment will not lie for it: Though where a Person is beaten, He may prosecute for the Trespass by Indictment or Information, as well as Action of Assault and Battery;

but not more Ways than one. Indictment doth not lie for a Private Nusance, or other Injuries. 2 Lill.

If an Indictment be good in Part, and the other Part of it is nought, the Court will not quash it. And the Court will not quash an Indictment that is preferred for the Publick Good, altho it be not a good Indictment, but will put the Party indicted to traverse, or plead unto it. Latch 173.

Although Exceptions be taken against an Indictment, to the Intent the Court should quash it, yet the Court will grant Time to the King's Counsel to maintain the Indictment, if they desire it. Hill.

23 Car. B.R.

As the King hath the Protection of and an Interest in his Subjects, therefore for Crimes against them. the Suit is in his Name. The Name and Additions of the Offender, Time, Place, &c. must be inferted, for the better Certainty that it was the Offender and the Offence: And in Murder, the Dimensions of the Wound, that it may appear whether or no the Wound was Mortal; but if the Party be Run through, it is in vain to mention them, when the Wound it self shews it. Indiaments are to be more Certain than Common Pleadings, because they are more Penal, and ought to be more precisely answered. They may be Amended in Time, so as not to Delay; and Words of Form shall not hurt them, but Words of Substance make them void; for the Law chiefly Regards the Substance in all Proceedings. Assaulting on the Highway is a Breach of the Peace; and Cheating is a Crime against the Common-wealth. But for Civil Matters, private Injuries, &c. Indiaments lie not; for they are to punish Publick Offences only. It is a Favour of the Court to quash any Indicaments; and if one is convicted on en Erroneous Indictment, the Judgment may be reversed by Writ of Error. The Maintenance of Indicaments is for the Good of the Publick, and consequently regarded. If

If an Indictment is void for Insufficiency, &c. another Indictment may be drawn for the same Offence, whereby the Insufficiency may be cured; and it may be laid and tried in another County, though Judgment be given. But if upon an insufficient Indictment of Felony, a Man hath Judgment to be Hang'd, he shall not be again indicted until that Judgment be reversed. 5 Rep. 121.

A Rep. 40, &c.

A Man may be twice indicted, where he hath committed two Felonies. A Person having committed divers Felonies, was indicted for one, and had his Clergy; and at the same Time indicted for another Felony, and found Guilty, and Hang'd.

Kel. Rep. 30.

In all Cases Justice is to be Administred; and Insufficiency of Process shall not bring off Offenders from Punishment. A Man must be tried and acquitted, (Autresists Acquit) to make his Life in Jeopardy twice for one and the same Offence, and to maintain that Plea in Law. The Judgment of Suspendatur per Collum, is the End of the Law for Felony; so that a Person shall not be in that Case twice indicted.

### Infants.

A N Infant in our Law, signifies any one under

A twenty-one Years of Age.

If an Infant under the Age of Discretion, commit an Act amounting to Felony, he shall be free from the Punishment inslicted on a Felon; but if he be of the Age of Discretion, tho' he be not of sull Age, he shall suffer as a Felon: And one Under those Years, having attained Maturity of Discretion, if he commit any Felonious Act, he shall be Executed as a Felon. Co. Lit. 247.

I 4 A Man

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A Man or Woman before the Age of twenty-one Years may not Alien any Lands or Tenements, Goods or Chattels, or bind themselves by Deed, except it be for Eating, Drinking, Apparel, Schooling, Physick, and such like Necessaries, suitable to their Qualities: But if they bind themselves in a Penal Obligation for the Payment of any of these, the Obligation shall not be Binding. And Action of Account shall not be brought against an Infant, though he make an Account with his Creditor, and reduce what he is indebted to a certain Sum. I Inst. 171, 172. Trin. 24 Car. B. R.

It is said Infants are not obliged to pay for Clothes, unless it be averred for their own wearing; and that they were convenient and necessary for them to wear, according to their Degree and Estate. Cro. Jac. 560. And Money laid out for an Infant, hath been allowed, when Money lent hath not. The Infant may buy, but cannot borrow Money to buy Necessaries; if he does, it is at the Peril of the Lender, who must lay it out for him in Necessaries, or see it thus laid out. 5 Mod.

Rep. 368. 1 Salk. 386.

An Infant may Purchase; but at his sull Age he may agree to and confirm it, or wave or disagree to it. 1 Inst. 2, 172. If an Insant makes a Deed and delivers it, and afterwards delivers it again at sull Age, it is nevertheless void: But if he make a Lease, and accepts the Rent after his coming of Age, the voidable Lease is made good. Cro. Jac. 320. 3 Rep. 35.

All Gifts, Grants, &c. made by an Infant, which do not take Effect by Delivery of his Hand, are void; and if made in Writing, so as to take Effect by the Delivery of his own Hand, they are voidable by himself or his Heirs, or those who shall have his Estate. Matters in Faite Infants may

avoid either within Age, or when they come to full Age; but Matters of Record, as Fines, Statutes. Oc. must be avoided during their Minori-

tv. Co. Lit. 380.

Things of Necessity must be done by Infants: fuch as Presentations to Benefices, &c. otherwise Lapfe will incur against them. Conditions annex'd to Lands bind Infants, and must be performed. but Non-claim doth not. An Infant shall sue by Prochein Amy, and defend by Guardian; and Infants may plead infra atatem, Oc. 1 Inft. 135. Lutw. 241.

Fourteen is by Law the Age of Discretion, for committing of Crimes: But an Infant's Age of Diferetion, hath been apply'd to the Time of his Knowledge of the Laws; for when he hath Diferetion of Mind to know the Law, he shall have the Punishment of the Law. Necessaries of Life. Infants, and all others, are obliged to pay for; but an Infant may not Enter into Bond for them, or make up Accounts, &c. because he is not in Law of Ability to Agree to any Thing against himself. or to State an Account. The Law will not truff an Infant with Money; so that it must not be lent to him. A Purchase is intended for the Infant's Benefit: And a Deed must take effect from the first Delivery. Common Acts Infants may avoid when at Age; Matters of Record must be avoided within Age, because they are Judicial Acts, and the Court is to try the Nonage by Inspection. The next Friend is to sue for the Infant. as he is supposed Tender of his Interest; but the Guardian is to defend his Suits, who has Possession of his Fortune to do it. actions over Recognizations are to

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#### Informations and Informers.

Nformation for the King, is that which for a common Person is called a Declaration: And it differs from an Indictment, which is found by the Oath of twelve Men; and this is only the Allega-

tion of the Officer, Oc. 1 10 10 10 10 10

There are two Kinds of Informations: at the Suit of the King only, or at the Suit of the King and of the Party, which is called an Information Qui Tam upon Penal Statute. And Information may be brought for Offences and Misdemeanors at Common Law: As for Batteries, Libelling, Nufances, Contempts, Seditious Words, &c. wherein the Offender is liable to a Fine to the King: It doth not lie for a capital Crime, Oc. Finch. 340. Show. Rep. 109.

Informers are to exhibit their Suits in proper Person, by Way of Information, &c. and not to compound with the Defendant, without Confent of the Court, on Pain of 10 l, and Punishment of the Pillory, &c. And if they Discontinue, or are Nonfuit, the Court shall assign Costs to the Defendant, Stat. 18 Eliz. c. 5. All Informations or Penal Statutes, brought by a common Informer, where a Sum certain is given to the Profecutor, must be brought in the proper County where the Offence was done, and within a Year after. 31 Eliz.

On Informations exhibited in the Crown-Office. for Trespass, Battery, &c. Recognizances are to be entered into of 201. Penalty for the Informer

to profecute with Effect, &c. 4 & 5 W. & M. c. 18. Informations are not Quash'd for Insufficiency,

like to Indictments.

By Law the King shall put no Man to answer for a Wrong done to another without Indicament or Prefentment; and an Information by the Attorney General is no more than a Presentment; and where other Methods of Proceeding against Offenders are not appointed, Informations may be brought of common Right. But Informers are not to compound Offences, which as it were makes them Accessary to them; and it is fitting they should be bound to prosecute, who accuse, that the Crime may appear. A Man may be a Witness in his own Case on Information, because it is the Suit of the King.

#### Inheritance.

I Nheritance is a Perpetuity in Lands or Tenements, to a Man and his Heirs. But Goods and Chat-

tels, can't be turn'd into an Inheritance.

The Law of Inheritance prefers the first Child before all others; the Male before the Female, and of Males the first Born: And if there be no Children, then the Brother; if no Brothers, Sisters; if there be neither Brothers nor Sisters, then Uncles; and for Want of Uncles, Aunts; and if there be none such, then Cousins in the nearest Degree of Consanguinity, shall inherit. Bacon. Elem. Co. Lit. 14.

Without Blood none can Inherit; and therefore it is, that he who hath the whole and entire Blood, shall Inherit before him who hath but Part of the Blood of his Ancestor. And Braston saith, That from the double Right of Blood, as well on the Part of the Father, as on the Part of the Mother, a Sister is a nearer Heir than the Brother by another Wife, and shall inherit before him. 3

By our Laws, Inheritance can lineally Descend, but not lineally Ascend. If there be Father, Un-

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cle, and Son; and the Son dies, the Uncle shall Inherit the Son. In the Collateral Line, lineal Afcension is not prohibited; and in Case of Purchase, it is otherwise. .. 3 Co. 49. und brom on ai land

Inheritance goes to the Eldest Son, and his Issue, for fupporting the Dignity of the Family: But Goods and Chattels may not be an Inheritance, because they are not durable; and what is not durable, may not be inherited. The Worthieft of Blood are to inherit; for it is the Blood which makes the Family: And it is great Reason that the whole Blood should be preferr'd before the half Blood. It is the Nature of Inheritances to descend from Father to Son, &c. and not to Whichtonce is a larpedativin Lands of

to a Man and his Heirs | But Con-

### Injuries. b'arus ad a'gas alos

Njury fignifies any Damage to a Man's Person or I Goods. And the Law fo abhors Injuries, that it grants Writs of Anticipation to prevent them. 370

Confederacy and Combination to execute any unlawful Act, is punishable by Law, before the unlawful Act is executed; the Law punishes the Combination and Confederacy, to prevent the unlawful Act. And the Commission of Over and Terminer gives Power to the Judges, Oc. to enquire of all Combinations and Confederacies. 9 Rep. 57.

As to Injuries of a private Nature: A Man must not drive Beafts out of the Highways upon the Lands of another adjoining. A Stranger having Lands adjoining to an ancient Built Houle, may not erect a House upon his Lands, and darken the Windows of the other, Oc. These are Injuries which the Law punisheth. Lev. 122.

It is forbidden in Law, that any one fould do

that in his own, that may injure another.

There

delarged, or pervess There is an Antipathy between the Law and Injury. To prevent Mischief, is lawful, because by the Exercise of the Law herein the Peace is preserved. A Man must so enjoy his own Property, that he doth not occasion Damage to others; if he does, he shall make Recompence; for all Damages have a Recompence by Law annexed to them. Erecting a House near an ancient Built House, and darkening the Windows, is not lawful; because the ancient Built House hath Prescription to enjoy Lights: And not only Light, but Air, &c. neceffary for a Man's Health, is injured by fuch Buildings. the hell Way is to try it by the Rules of

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#### mon Law , which being foundly applied to Novelies, it dolla benneunn Pinems for

A N Innuendo is a Word used in Declarations and Pleadings, to ascertain the Person or Thing which was Named, or left Doubtful before: As to fay He, (Innuendo the Plaintiff) did so and fo, when as there was Mention before of another Person.

In Slander, both the Person and the Scandalous Words ought to be certain, and not want an Innuendo to make them out: And Innuendo may not enlarge the Sense of the Words, nor make a Supply. or alter the Case, where the Words are Defective. Hutt. Rep. 44.

Calling a Person Murderer, has been by Innuendo adjudged Murderer of Hares; where a Defendant talking of unlawful Hunting, the Plaintiff confessed he had kill'd divers Hares, and thereupon the Words were spoken. 4 Co. 13.

We fee here the Office of an Innuendo, one Part whereof is to reduce doubful Things to a Certainty; but fome Things are to be certain, and not require an Innuendo to make them out : Nor may the Sense

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of Words be fupplied, enlarged, or perverted; which would be highly upjust. And Innuendo's to explain doubtful Matters, when allowed, should be rather in Favour of a Man than against him.

#### Innobations.

Thnovations have been always thought dange-

rous by our Laws.

And the Great Judge Littleton tells us, that when any Innovation or new Invention Starts up, the best Way is to try it by the Rules of the Common Law; which being soundly applied to such Novelties, it doth utterly Crush them; for commonly a new Invention doth offend against many Rules and Reasons of the Common Law: And therefore the ancient Judges of the Law have ever suppressed Innovations and Novelties, less the Quiet of the Common Law should be disturbed: And so have Acts of Parliament many Times done the like. Co. Lit. 379.

In the Reign of Edward III, the Judges said, We will not change the Law which always hath been used. And in 2 H.4. It is better that it be turned to a Desault, than that the Law should be changed, of any Innovation made. 1 Inst. 303.

As Innotations of centimes create great Confusion and Uncertainty in Law Proceedings, they are always rejected, unless it be in Cases of great Necessity, and then they are permitted with the utmost Caution: And our most prudent Judges have ever rely'd on Precedents in their Determinations, as their best and safest Rule to Walk by, because they are generally not only the Opinion of the Makers, who were Men of Great Wisdom, but by their being followed, on due Examination of many others equally Wise.

### Inns.

INNS were originally allowed for the Relief and Lodging of Travellers: And at Common Law any Person might erect and keep an Inn or Ale-house to receive Travellers; but now they are to

be licensed and regulated by Statute.

These Inns ought to be situated in Towns, and not in By-Streets, &c. And if any Innkeeper refuse to Lodge 2 Traveller, or to find him Victuals for his Money, he may be indicted, or the Party may bring Action of the Case against him. 8 Rep. 32. Innkeepers shall be answerable for Thests committed by their Servants or others, upon one that lodgeth in their Inns; but he is to be a Traveller, and not one of the same Town. Ibid. And where any Innkeeper harbours Thieves, idle Persons, Vagabonds, &c. or suffers frequent Disorders in his House, he may be indicted and fined. H. P. C. 146.

Travellers must be relieved wheresoever they go:
And Innkeepers are to answer for Thests, because
they have the Care of, and make a Profit of their
Guests. Inns built in By-Places are suspicious of
sheltering Robbers; and harbouring idle Persons,
or suffering Disorders, is a common Nusance.

#### Intendment.

I Ntendment of Law shall sometimes supply that which is not sully expressed or apparent. The Intent of Parties in Deeds, &c. is much regarded. But this Intendment shall not be implied against the Rules of the Law. And the Law doth

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not in Conveyances of Estates, admit them regularly to pass by Intendment and Implication; tho' in Devises they are allow'd with due Restrictions. 2 Lill. Abr. 72. Vaugh. 261.

Intendment cannot supply the want of Certainty in a Charge in an Indictment for any Crime, 60. 3 Rep. 121300 has the man held with

A Thing may be necessarily intended by what precedes or follows it; but no Intendment or Con-Arudion shall be admitted contrary to the direct Rules of the Law, because all Construction is guided by Law. In Devises, Intendment shall take Place, where it is not only Conftruence and Possible, but Necessary; as that the Devisee shall have the Thing devised, or no other.

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### Intrucions.

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I Nerulion is when the Ancestor dies seised of any Estate of Inheritance, expectant upon an Estate for Life, and then Tenant for Life dies, between whose Death and the Entry of the Heir, a Stranger Interpoles. It is a violent or unlawful Entrance into Lands or Tenements, void of a Possessor, by him that hath no Right to them : For Example ; AMan steps into Lands, the Owner whereof lately died, and the Right Heir, neither by himself or others, hath yet taken Possession. Co. Lit. 277.

These Intrusions are against the Common Law

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Our Law allows no one to make any Intrusion upon another: And, es I have already observed under Diffeifin and Forcible Entry, Entry upon Lands muft in all Cases be by Law, and not by Force, to be justified at Law.

#### Jointures, &c.

A Jointure is a Covenant or Settlement, whereby the Husband Affureth to his Wife, in Confideration of Marriage, Lands or Tenements for her Maintenance after his Decease.

A Jointure must take Effect for the Life of the Wife, in Possession or Profit, immediately after the Death of the Husband; it is to be made for her felf, and none other for her, for the Term of her own Life: It must be in full Satisfaction of her Dower, and be so expressed; and it may be made either before or after Marriage. 27 H. 8.

But if the Jointure be made before the Marriage, the Wife hath not Power to waive it, and claim her Dower at the Common Law, as she may do. if it be made after Marriage, for the may then refuse the Lands appointed her in Jointure, and have her Dower. 1 Inst. 36.

If a Wife be Evicted of her Jointure, settled before Marriage, the shall be endow'd according to the Rate of her Husband's Lands whereof the was Dowable: But if Baron and Feme by Fine, Alien the Lands thus fettled in Jointure, the shall not be endowed of any other Lands belonging to the Husband. Where the Jointure is made after Marriage, it is otherwise, the Jointure being Waivable. Co. Lit. 36.

Jointure is such a Part of an Estate as the Husband himself shall agree to settle upon his Wife; Dower, is a Third Part of his Lands and Tenements, whereof he is seised during the Marriage, appointed by Law.

The Law directs the particular Settling of Jointures for Women, and is careful to preserve them, being made for their Maintenance, and generally in Consideration of the Marriage Fortune. When a Jointure is made to a Woman before Marriage, it is the strongest; because it is presumed to be done upon this Consideration, and fully to answer the Fortune and Maintenance, or it shall be adjudged her Fault: But it may not be so afterwards, when less to the Disposition of the Husband. If she be Evicted of her Jointure, it is reasonable the Law should provide her a Dowry. And a Fine is the only way by which a Wife may part with her Estate, when she cuts her self off by her own A& upon Record. The Election of the Wife to claim her Dower, is not till after the Death of her Husband; and then she may claim it, notwithstanding her Fine of her Jointure, where the Jointure is originally Waivable, and not absolute.

#### Jointenants.

Jointenants are those that come to and hold Lands or Tenements jointly by one Title: These Jointenants must jointly Plead, and be Impleaded by others; and they have a sole Quality of Survivorship, which Coparceners have not.

At the Common Law, before the Statutes 31 H. 8. c. 1. and 32 H. 8. c. 32. Jointenants by Confent might have made Partition; and if they had been possessed of a Lease for Years, they might have done it by Parol; but if they had been seised of an Estate of Inheritance, or for Life, they could not have made Partition without Deed. Co. Lit. 187.

If an Husband and Wife, and a Third Person had purchased Lands to them and their Heirs, and the Husband before the Stat. 32 H. 8. c. 1. had aliened the whole Land to a Stranger in Fee, and died: In this Case, the Wife and the other Person were Jointenants of the Right, but in several Manners,

Manners, viz. the Wife had Right of Action, and the other Jointenant Right of Entry; and these differing Rights might well stand together in

Tointure. Co. Lit. 188.

Altho' Jointenants are (by Littleton) said to be seised per my & per tout, yet can they not singly dispose of more than the Part that belongs to them, as to Enseoss, Give, Demise, Forseit, &c. And where all the Jointenants join in a Feossment, every of them, in Judgment of Law, doth give but his respective Part: Also if two Jointenants make a Feossment in Fee upon Condition, and that for the Breach thereof one of them shall Enter into the Whole, yet he shall Enter into but a Moiety, for no more, in Judgment of Law, passed from him. And so it is of a Gist in Tail, or a Lease for Life, &c. 1 Inst. 186.

I take it, the Diversity between Jointenants and Coparceners, that one hath Survivorship, and the other hath not, proceeds from Coparceners having always Estate of Inheritance, by Discent in Law; but Jointenants have different Estates, as in Fee, for Life, &c. by Deed, or Conveyance. The Alienation of an Husband Jointenant of the whole Land, Granted to Husband and Wife, and another Person, is a Discontinuance to the Wife of her Moicty, and a Diffeifin to the other Jointenant of the other Moiery; but the Wife, and the other Jointenant are Jointenants in Right, though their Rights are different; and they may join in a Writ of Right. Jointenants being en-titled only to a Part of Lands, may in no Cafe lawfully Dispose of the Whole; but their Parts they may Grant to others, and then Survivorship be at an End, for want of Privity.

#### Adues.

TSSUE fignifies the Point of Matter issuing out of the Allegations and Pleas of the Plaintiff and Defendant in a Cause, to be tried by a Jury of twelve Men: And these Issues are of two Kinds; upon Matter of Fact, or Matter of Law on a

Demurrer, Oc. 1 Co. Inft. 71.

Issues in Fact are General, or Special: And there may be an Issue to Part; and a Demurrer to Part. Every Issue consists regularly of an Affirmative and Negative; there must be an Affirmation on the Part of the Plaintiff, that the Defendant owes fuch a Debt. Oc. and a Denial on the Defendant's Part, that he oweth not the Debt, &c. And in Action for Damages, according to the Loss which the Plaintiff hath fustain'd, every Part ought to be put in Issue. 1 Saund. 269.

An Issue must be Certain and Single, and join'd upon the most material Thing in the Cause: And where an Issue is not join'd, there cannot be a good Trial, nor ought Judgment to be given,

2 Nelf. Abr. 1042.

In the Nature of Things all Controversies must be reduced to a Point or Question, in order to their Determination, and otherwise the Jury would not know what they were upon; which Queftio fatti is Issue, and is to contain the most material Allegations of the Parties, that all the Matter in Question between them may be tried. And where Issue is not join'd, there is nothing in Law before the Jury to try; so that in this Case it shall be coram non Fudice.

#### Judges. . Mano gent o

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Iudge is a Chief Magistrate in the Law, to try Civil and Criminal Causes, and punish Offences.

Our Judges, on Admission into their Offices, take an Oath to serve the King, to do Justice to all Men, without Respect of Persons, and deny Right to none, though commanded by the King; to take no Bribes or Reward; maintain no Suir, nor give Counsel where they are Parties, Oc. and they are Answerable in Body, Lands and Goods, 18 Ed. 3.

No Judge or other Person, Learned in the Law, shall be Justice of Assife in the County where born, or he doth inhabit, under the Penalty of 100 l. But this is not to prejudice any Judge of either Bench, in Hearing and Determining Affises in thole Courts, Gc. 33 H. S. A Judge of B. R. cannot be made by Writ, but by Commission under the Great Seal; though he may be discharged by

Writ Sub Magno figillo. 8 Rep. 18.

Spull in

Tudges are to pronounce Sentence according to Law, and what is alledged and proved: They have not Power to Judge according to that which they think fit, but that which by the Law they know to be Right. 7 Rep. 27. And it is a Maxim in our Law, that whatfoever is not discussed and tried. is not to be reputed Justice, Quicquid non excutitur, Justitia non putatur. In very ancient Times, Persons were found Guilty and Condemned without Answer, as they are in France, and other Countries; but King Alfred abrogated that Cufrom in England, and decreed, that no Person EDJA ... K 3

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should be condemned or executed without Answer.

Co. Lit. 71.

No Man ought to be a Judge in his own Case; as if a Man have Power to hold Cognizance of Pleas before him in such a Place or Liberty, yet he cannot hold Plea to what he himself is a Party. 8 Rep. 118.

The Oath of the Judges is very strictly appointed:
They are to administer Justice indisferently and Impartially to all, and deny no Man Right, on any Pretence whatsoever; nor shall they take any Reward for doing of Justice: All which is agreeable to Natural Equity. A Judge is supposed to be Partial in his own County, and therefore excluded by Law to Judge therein. He may do Nothing of his own Will and Fancy; for the Law only must direct his Judgement. If a Judge decree any Thing, a Party not being heard, tho he hath done what is Right, yet hath he not done what is Just and Equal, because the Party should be heard to defend himself. No Persons can be at the same Time, Judges, Ministers, and Parties; to Judge, Proceed, and recover for themselves.

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law, and what is alledged and proved:

Judgment is the End of the Law, and the very Voice of Law and Right. It is given by the Court, upon Consideration had of the Record before them: And must agree with the Verdict; for if a Judgment be given contrary to the Verdict found in the Cause, it is a void Judgment. Prast. Reg. 352.

If Judgment be given for more than the Plaintiff doth demand in his Declaration, this Judgment is Erroneous; but the Plaintiff in Entering it up may Enter a remifit Dampna for Part. And a

Judg-

Judgment must be Entered, or it is no Judgment, the Really signed. If a Judgment be unduly obtained, on Proof thereof to the Court, the Court will value the Judgment, and restore the Party damnified by it, so as to be in the same Condition he was in before Judgment. 2 Lill. Raym. 100.

The Court will not give a Judgment which they know would be against the Law, altho' both the Parties, Plaintiff and Defendant, do agree to have

fuch a Judgment given.

If a Verdict pass for the Plaintiff, and the Plaintiff will not Enter his Judgment upon the Verdict, the Defendant, by Motion of Court, may compel the Plaintiff to Enter it. A Special Judgment is, where one brings an Action for divers Things, and the Plaintiff hath a Verdict upon the whole Declaration, and doth wave some one or more of the other Things, for which the Action is brought; in such Case he must Release his Damages to all, and yet he may have his Costs of Suit. 2 Littl. 97.

After an Issue is joined, to be tried by the Plaintiff and Desendant, the Plaintiff may, if he will, without going to Trial, accept of a Judgment from the Desendant without any Verdict in the Cause; which Judgment must be by relicta verifications

cognovit actionem.

Judgments are to be Warranted by the Verdict, which is the Foundation of them, and therefore must not contradict it; they are an Affirmance of the Verdict. Judgment is not to be given for more than the Plaintiff Demands; because that would be to give one more than is his due, and is as unjust and unequal as to deny any one that which is his Due. It is Entering of a Judgment, which makes it Matter of Record; and Signing it is only a Warrant for its Entry. The Court will not maintain Judgments unduly obtain'd, to do any Person Injury; but will punish the Party

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that used the Fallacy to obtain them. Nor will they err against their Knowledge, to please the Parties. The Plaintiss may be compelled to Enter his Judgment, for otherwise the Defendant would be hindered from Pleading it in Bar to another Action for the same Cause. There is no Damage to the Parties by Judgment before Verdict, but on the contrary Costs are Saved.

### Judgment Arrefted.

TO Move or Plead in Arrest of Judgment, is to shew Cause why Judgment should be staid, notwithstanding the Verdict be given: And sour Days are allowed in B. R. to remove in Ar-

rest of Judgment, Gc.

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There may be Arrest of Judgment, for want of Notice of Trial; or because the Plaintist before Trial treated the Jury; for that the Record differs from the Deed pleaded, in some material Points, &c. or Judgment may be Arrested for that which appears upon the Issue-Roll; as Defect in the Pleading, for misnaming Persons, &c. tho there be a Verdict. 2 Lill. And Judgment may be Arrested in criminal Cases, if the Indictment be insufficient, &c. 3 Inst. 210.

Here all Matters of Fact must be made out by

Affidavitate of particular of all or ma elaumybus

Regularity being required in all Law Proceedings, when it is not followed, Judgment may be Arrested till the same is examined into, and the Cause allowed or disallowed by the Court. And if there be Cause to be relieved against Proceedings at Law, the Defendant may also bring Writ of Error, &c. that the Court may Remedy Defects, and in all Cases see that Justice be done.

## Juricdiaton.

TUrisdiction is an Authority or Power, which a Man hath to do Justice in Causes of Complaint

brought before him.

The Court of B. R. hath a general Jurisdiction to reform the Abuses of all Persons in their Behaviour throughout all England; and the Abuses and Miscarriages of all Courts of Justice throughout the Realm. And nothing shall be intended to be out of the Jurisdiction of a Superior Court, but only that which Specially appears: But on the other Hand, nothing shall be intended to be within the Jurisdiction of an inferior Court, but only that which is expresly alledged. I Saund. 74.

The Jurisdiction of a Court where a Cause is depending, cannot be extended farther in Relation to that Cause, by the Consent of the Plaintiff and Defendant, than of Right it ought to extend. And if a Court hold Plea of what doth not belong to it: As if the Court of Common Pleas hold Plea in an Appeal of Death, &c. and the Defendant is Attaint, it is Coram non Judice, and void; and Actions lie against Officers and Ministers, that execute Precepts and Processes of Courts which act where they have no Jurisdiction; but when a Court hath Jurisdiction of a Cause, and proceedeth erroneously, there the Party who sueth, and the Officers of the Court, are not liable to Action. 10 Rep. 57.

When a Court is prohibited by Statute to hold Plea of certain Causes, if one be sued there contrary to that Statute, he may not only have a Supersedeas (in Nature of a Prohibition) to cause the Judge to cease Proceeding; but likewise shall have

an Action upon that Statute against the Party, that sues contrary to the same Statute, notwith-standing it is in Course of Legal Proceedings, and the Words of the Act do not expressly give any such Action. 10 Co. 75.

The Court of King's Bench is the Supreme Court of the Kingdom, to take Cognifance of the Behaviour of all Persons within the same; and it is Good Behaviour which conduces to the Peace of a Nation, for Prefervation whereof this Court was chiefly ereded by the Crown. It is reafonable Superior Courts thould have Superiour Privileges: But Jurisdiction of a Court is not to be extended by Consent of Parties; for that would be for the Parties to erect (as it were) a Court which was not before, for Trial of their Cause; and by this Means the Jurisdiction of Courts might grow unlimited. Courts are not to exceed the Jurisdictions assign'd them; because where a Man hath no Authority, he is not a proper Judge: And the Court of Common Pleas, which buth the Trial of Property of Lands, is not a Court to try eriminal Matters. Officers must not execute Prosol ceffes of Courts, the Judges whereof are not Judges of the Cause, because such Judges cannot maintain them in it. Action is a Relief implied in every Statute to fee it observed.

# and Actions die against Officers and Manders, that execute Prescripts and espirate of Cours which act where a where they have no including to be when a

A Jury fignifies a certain Number of Men sword to enquire of the Matter of Fact, and declare the Truth upon such Evidence as shall be delivered them, in a Cause touching the Matter in Question.

There are two Sorts of Juries, the Grand Jury and the Petty Jury: The Grand Jury confifts usually of twenty four Men, of Greater Quality than the other, and their Office is more general, as extending

the Petty Jury confilts of twelve Men, and are impanell'd in criminal Cases, commonly called the Jury of Life and Death. The Grand Jury proceeds by Presentment, and Finding of Bills, &c. of which there must be twelve of them at least agree in their Verdict or Presentment; but the whole Number of the Petty Jury must agree in

their Verdict. 13 Co. Inft.

And the Grand Jury confiders of all Bills of Indictment preferred to the Court, which they either approve, by writing upon them Billa vera, or Disallow by writing Ignoramus. Such as they approve or find, if they touch Life and Death, are referred to the Petty Jury, to be also enquired of: And both Turies are to enquire diligently into the Character and Circumstances of the Witnesses, the Probability of their Testimony, and whether they do not swear out of Malice, Subornation, Self-Interest, &c. of which they are to Judge, and give their Verdict accordingly. Upon the Allowance of the Bill by the Grand Inquest, a Man is faid to be indicted; and on the Petty Jury's bringing in their Verdict, that they find him Guilty, he is Convicted; whereupon he receives the Sentence and Judgment of the Court. 3 Inft. 30, 31.

After the Evidence is given in any Trial, the Jury are to be kept together without Meat, Drink, Fire, or Candle, otherwise than with Leave of the Court, till they bring in their Verdict; and the Court may not give them Leave to Eat or Drink out of Court. When a Juror is sworn, he shall not go from the Bar until the Evidence is given, without such Leave, and then must have a Keeper with him. And a Jury sworn and charg'd in Case of Life and Member, cannot be discharg'd

till they give a Verdict : But in Civil Cases it is otherwise. 1 Inft. 227. 2 Lill. 123, 127.

As the Judges in any Cause Judge of the Law. fo the Jury are Judges in Matters of Fact; and in fome Cases they may also Judge of the Law. If they take upon themselves the Knowledge of the Law, and give a general Verdict, it is good: for they may determine both the Law and Fact, (as where a Man is Indicted of Murder, the Jury do not only find him Guilty, but may find him Guilty of Murder, or Manslaughter, Oc.) or they may find the Matter Specially and at Large, and leave it to the Judges to decide what is the Law arising upon the lact. A Juty are Fineable, if they are unlawfully dealt withe And if they give a corrupt Verdict between Party and Party, they are liable to Attaint; and the Punishment on Attaint by the Common Law was, that the Juror's Houses should bel broke drown, his Meadows plowed up, and Lands forfeited, Oc. 1 Inft. 294. 3 Inft. 110.

By Statute Constables, &c. at Michaelmas Quarter-Selfions yearly, are to return to the Justices of Peace, Lists of Persons Qualified to serve on Jusies and Sheriffs shall impanel no others, oc. And Jurors not appearing thall forfeit Issues, if they have no reasonable Excuse for their Default.

24 H. S. c. 6. 7 6 8 W. 3. c. 32. 1 34 191A

As to the Qualification of Jury-men, they are to have 101. per Annum, Freehold or Copyhold, within the same County; and Tales men 51. pen Ann. But in Corporations, Felons may be tried by Freemen worth 40% in Goods) They are to be the next Neighbours, to be Freemen, Indifferent, and not Outlawed, or infamous Persons. Aliens, Men Attainted of any Crime, Clergymen, Apothecaries, Infants, Oc. are not to serve on Juties. Co. Lit. 154. 3 Inft. 27. Stat. 4 & 5 W. & M. Trial

Trial by Juries is the most valuable and substantial Liberty that Freemen can enjoy: They have the Great Power of Life and Death in their own Hands. and it is not to be prefumed that Freemen will exercise it unjustly upon one another. Of that Importance is the Life of a Man, that two Juries must find him Guilty, before he shall be sentenced to fuffer: And the whole Number of Petry Jurors must agree; so strict is our Law, that the Guilt may appear. They may fometimes Judge of the Law, as well as of the Fact; but it is best in Cases of Difficulty to refer it to the Judges; for the Juries are generally as improper Judges of Matters of Law, as the Judges are of Matters of Fact. The firich keeping of Jury-men together till they are agreed, is to prevent Corruption; and it is reafonable there should be a severe Punishment inflicted on Jurors for a corrupt Verdict. Jurors are to have certain Qualifications, because they have a Truft, even of Life; and they are to be Honest and Indifferent, or else they cannot Judge as they ought. Clergymen are prohibited by the Canon Law to have a Share in Trials of Blood: And Apothecaries are supposed too regardless of a Man's Life, to serve upon Juries.

Exceptions may be made to a Jury-man, where one of the Parties is of Affinity to him; is his Master, or hath any Interest in the Thing demanded; if the Juror hath given a Verdict before in the same Cause; or if after returned, he Eats and Drinks at the Chaage of either Party; if the Juror is Convicted of Felony, Perjury, &c. or be an Alien, a Minor, or otherwise not Qualified; which Exception is called Challenge: And Challenge may be made to the Panel of the Sheriff, by Reason of Kindred, or Affinity to either of the Parties, Oc. 1 Inft. 155, 172. 2 Roll. Abr. 636.

A Person indicted for Treason may challenge thirty-five Jurors peremptorily, without shewing any Cause; and in Murder and Felony, twenty, and with Cause more: But in Treason for compassing to Kill the King, &c. no Challenge is to be

allowed but for Malice. Co. Lit. 155.

The Time to Challenge a Juror is before he is fworn: And if some of a Jury are challenged, they shall be tried by the rest of the Jury on Oath, whether Indifferent; and a Juror challeng'd may be examined upon Oath, where not to his Discredit. Finch. 412.

If one challenge a Juror, he shall assign the Cause; and if he alledge not a good Cause, the

Inquest is to be taken. Stat. 33 Ed. 1.

Challenge to Jurors is in order to have an Impartial, Indifferent and Honest Jury: And peremptory Challenge, without shewing Cause, is an Indulgence the Law allows in favorem vita. But in Treasion against the King's Person, there must be Malice to Except against a Juror, because this is the worst Kind of Treason, and, in Essect, a Crime of the highest Nature against the whole Kingdom.

#### Bing's Pzerogatibe.

THE King (fays Bracton) is the Minister of God, upon Earth; every one is under him, and he under none, but only God. By his Coronation Oath, he swears to govern his People according to the Laws; to cause Law and Justice, in Mercy, to be executed in all his Judgments; and that he will, to the utmost of his Power, maintain the Laws of God, and the true Religion, Go.

He is the Fountain of Justice, and hath a Prerogative above all his Subjects. In our Law the King never dies; and he can neither do himself Injury or others. All Lands are holden either mediately or immediately of the King: Lands in the King's Possession are free from Tenure; and the King cannot be Jointenant with any. Co.

Lit 1. Finch. 83.

All Estates for want of Heirs, or by Forseiture, Escheat to the King. And the King hath the Custody of the Persons and Estates of such as for want of Understanding cannot govern themselves, as Ideots, Lunaticks, &c. The King is to have Lands of Felons Convict, a Year; and the Goods of Felons and Fugatives Attainted. Also Mines of Gold and Silver belong to the King, Wreck of the Sea, Whales, Sturgeon, &c. Stat. 17 Ed. 2. 9 H. 3.

The Grant of the King is taken most strongly against a Stranger, and more savourable for the King; whereas it is otherwise of a common Person. If the King grant Lands in Fee, upon Condition that the Grantee do not Alien, it is good; but void in others. But where the King by Fraud, or False Suggestion is deceived, he shall avoid his own

Grant. Plowd. 243. 1 Inft. 30.

The King may grant a Thing in Action, which another cannot. If two be indebted to the King, and he release to one, it shall not discharge the other. The King may distrain for the whole Debt of one Tenant, where the Estate is let to several. Debts to the King are to be first satisfied; and untill his Debts be paid, he may protect the Debtor from the Arrest of others. And where the Title of the King, and a common Person concurs, his Title shall be preferred: But the King cannot grant Land, &c. but by Matter of Record. 1 Inst. 130. 2 Inst. 286.

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Sale of the King's Goods in open Market, will not take away his Property therein. No Prescription of Time runs against the King; and no Entry shall bar him. No Action lies against the King; but he must be sued by Petition in the Chancery. The King may sue in what Court he pleases; and he is in Judgment of Law no Minor. Plowd. 247.

4 Inft. 187. Finch 460.

These are some of the particular Prerogatives of the King, given by our Laws; besides his General and more publick Prerogative of making Peace and War, Assembling and Dissolving Parliaments, Determining Rewards and Punishments, moderating Laws, and pardoning Offenders, &c. His Proclamation in Calling or Dissolving Parliaments, Declaring War and Peace, &c. has the Effect of a Law; but he cannot by Proclamation, introduce new Laws, though he may inforce old ones discontinued. 1 Inst. 165. 3 Inst. 162.

He hath Power to call a National or Provincial Council; and by his Royal Affent, Canons made in Convocation have the Force of Laws. He is the Founder and Patron of all Bishopricks, &c. and may create Bishopricks, Universities, Colleges, Counties, Fairs, Markets, &c. 4 Inst. 325, 326.

Acts of Parliament are not Binding to the King, unless they concern the Common-wealth, or he be

especially named. 1 Eliz.

As a Great Lawyer hath observed, the Common Law of England excels all other Laws in upholding a Free Monarchy, by exalting the Prerogative Royal, and at the same Time maintaining the Liberties of the Subject Our King is sworn to govern his People by Law, and to cause Justice in Mercy to be executed, which are inseparable by the Laws of God. All Justice flows from the King; and he never dies in Law, but his Death is called a Demise to his Successor, so as the Dignity hath perpetual

petual Duration. Because the King hath no Superiour, he can hold of None; nor can he be Jointenant with any, for none can be equal with him. As he is the Head and Father of his People, he is Lord Paramount of all the Lands in England. And he is entitled to Forfeitures of Offenders, because he hath the Execution of the Laws against them, and the Prefervation of his Subjects. Mines of Gold and Silver belong to the King, who only hath Authority The Coin it into Money ; and Treasure is the Ligament of Peace, and Sinews of War. Our King hath the large Possessions of the Sea, for the Sea the Royal Prerogative is fo Great, that what is Law almost in every Case of the King, is Law in of the Subject; and yet none of his Prerogatives injure others; for the King by our Law can do no Wrong.

If a King hath a Kingdom by Title of Descent, where the Laws have taken good Effect and Rooting, he cannot change those Laws of himself, without Consent of Parliament. And if a King hath a Christian Kingdom by Conquest, after the People have Laws given them for the Government of the Country, to which they submit, no succeeding King can alter the same without Parliament. 7 Rep. 17.

Such a King cannot alter the Laws without his Parliament; for it is the Parliament gives the Confent of the People, by whose Assent the Laws were established, and his Ancestor was King: And in as much as by the Laws of the Kingdom, he inherits the Crown, he may not of himself change those Laws, by which he hath his own Right, without affecting it.

ity of a Law. C. Here 15, 97, 114, Oc. 3.
There is no Law. To Abfolute or Kealeneble, but it may be Defective and Amendable; and therefore or electrons have tached therefore an ended or electrate Law, though the Prigo Court of Parkette facts always been very Courteurs in Subjectives

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the Head and Father of his Propie, he is Lord Para-

perual Duration. Because the King bath no Swellour, he can hold of Mone; nor can he be fointed a de a water thin the appropriate

mount of all the I and in Elected And he is contribed to Forfeitures of wishlers, because be have the Execution of the Laws against thom, and the Per-

THE Law is the Rule and Bond of Men's Ac-I tions; to ascertain what is Just between Man and Man, and what is not fo, and punish the Transgrellors: on to another og at on drad

The Law of England is divided into Three Parts: The Common Law, which is the most Ancient and General Law of the Realm; The Statute Law made and enacted in Parliament; and Particular Customs. But the Customs must be particular: for a General Custom of the Realm is Part of the Common Law. The Common Law is Grounded upon Reason; And the Great Lord Coke tells us, It is the Perfection of Reafon, acquir'd by long Study, Observation and Experience, and refined by Learned Men in all Ages. The Statute Law is made and palled by the King and the Lords and Commons, the Greatelt and Wifest Men of the Kingdom; and this is a Referve for the Government to provide against new Mischiefs, and new Evils, through the Corruption and Changes of the Times, as all Things are Mutable Custom, which is Law, is what is established by long Usage. and the general Confert and Approbation of the People, by their own Act; and what being practifed Time out of Memory, hath the binding Quality of a Law. Co. Lit. 15, 97, 115, Oc.

There is no Law fo Absolute or Reasonable, but it may be Defective and Amendable; and therefore the Common Law hath some times been amended by the Statute Law, though the High Court of Parliament hath always been very Cautious in Subject-

### Dig The Realdit of the Law. 147

ing the Common Law to any Mutations, unless Necessity required it, for the Suppression of Publick

Evils. Dav. Rep. 1 Co. Inft.

As the Court of Parliament can Controul the Common Law; and our Statutes have the Affent of the whole Realm by our Representatives in Parliament, the Statute Law seems to be the highest Law. But we find in our Books, that when the Common Law and Statute Law concur or interfere, the Common Law shall be preserved. Cd. Lil. 115.

The Laws of Ergland upon all Occasions favour Liberty: And by Magna Charta, no Freeman is to be imprisoned, Oc. without Trial by his Peers, or the Law: No one is to be Arrested, But by Process at Law; and none is to be outled of his Free-

hold, but by Law of H. 3: 2. 19.

All Countries require Laws for their Government, to prevent Injury and Violence, and the Invations of Men upon the Rights and Properties of such other. Were all Men Honest, there would be no Necessity for Laws; but amongst innumerable Multitudes of Men, it is not to be expected all should be Honest. Our three Great Laws are all of them adapted to a Free Reople: And the Common Law hath the Preference before the others, because it is the most Ancient, and hath the most Reason in it. The Liberty of a Man is very much favoured in Law, not only in Respect of the particular Profit which every one obtains by his Liberty, but also in Respect to the Rublick; for every Subject when at Liberty, is useful as well to the Publick as himself. The Law is to do Justice to all Persons, and in all Cases, being appointed and firted for it.

to Life, or in I all make it less generally butter

our mentions of two colors is a final be rates (as) to leave to the Legist but at Tenent in the marke a Legist for Life, without mentioning the

ing the Common Law to any Mutations, uniels No-

### Leafes, a benine with Leafes, or benines wither

A Lease is a Demile or Letting of Lands, Tenements, or Hereditaments to another, for Term of Years, or Life, for a Rent reserved.

In every Leafe for Years, the Term must have a certain Commencement and Determination: But if there appear no Certainty of Years in the Leafe, if by Reference to a Certainty, it may be made certain, the Leafe is Good. As if a Man make a Leafe of Lands to another for so many Years as he (the Lessor) hath in the Manor of Dale; and he hath then in the faid Manor a Term for ten Years, this is a sufficient Certainty to make the Leafe good for ten Years. And if a Leafe be made during the Nonage of a Person, who is fifteen Years of Age, it is a Leafe for fix Years, if he live fo of Men upon the Rights and los ages od gold gill

ou If a Leafe be made by Indenture, bearing Date the 26th Day of May, &c. To Hold for twentyone Years from the Date, or from the Day of the Date, it shall begin on the 27th Day of May: But if the Leafe be To hold from the making thereof, or from thenceforth, it shall begin on the Day in which it was delivered. Also if the Habendum be for the Term of twenty-one Years, without mentioning when it shall begin, it shall

begin from the Delivery. 1 Inft. 46.

Where a Lease for Years is made until such a Sum of Money shall be levied, it is as much as to fay, until fuch a Sum may be levied. If Tenant for Life, or in Tail, make a Lease generally, without mentioning for whose Life, it shall be taken for the Life of the Lessor But if Tenant in Fee make a Lease for Life, without mentioning the Life Di, The Reason of the Law. 149 Life, it shall be taken for the Life of the Lessee.

than for another's. A Leve once. 88 ledil. Co.

A Man seised of an Estate in Fee-simple, in his own Right, of any Lands or Tenements, may make a Lease or Grant of it for what Lives or Years he will. But a Tenant in Tail, cannot lawfully Grant a greater Estate than for his own Life, (unless it be by Fine, &c.) nor make Leases, otherwise than for twenty-one Years, or three Lives, reserving the accustomed Rents, &c. according to the Statute of 32 H. 8. And if a Lease be made of the Wise's Lands, it is to be made by the Husband and Wise.

If a Leafe is sealed by the Lesson, and the Lessee hath not sealed the Counterpart; yet Action of Covenant may be brought upon the Lease against the Lesson. Owen Rep. 100. And altho a Lessee for Years do lose his Indenture of Demise of the Lands let to him, he shall not lose his Term in the Lands let by the Indenture which is to lost; if it can be proved any way, that there was such a Term let unto him by Indenture, and that it is not determined. So it is of any other Estate in Lands, if it can be proved there was a Deed made. Oc.

There must be Certainty in all Leases, because the law chiefly regards Certainty. The Words of a a Lease, Sec. are not of any Effect till Delivery, and thereby in an Habendum, from the Making, but on from henceforth, they take their first Effect.

Lioung Lease till a Sum shall be levied, is meant till it may be levied; because otherwise great Mischief might ensue to him in Reversion, by deferring it, who may not Enter till the Sum is levied. Leases of Tenants in Tail, Sec. without ascertaining for whose Life, shall be taken for their own Lives, less it be a Wrong to the Reversioner, and the law contrives them to be such Leases as may be lawfully made. Of Tenants in Fee-simple, such a Lease shall be for the Life of the Lesses; they having

The Student's Companion:

having Power to make such a Lease, and an E-flate for a Man's own Life is of a higher Nature than for another's. A Leafe once scaled, is a good Leafe against the Leffor; for the Counterpert is only to shew what is done with the Agree-ment of the Lesse: And the the Lesse be loft, the Estate is good, being derived from the Party as it shews the Intention of the Maker, which is be by Hine, Ore 1 mor make Inistant bitstlation han

#### Retters of Attorney. and Renis

the awenty one Years, or three Livers referving the

to be made by the Husband and Wife. ETTER of Attorney is a Writing authorizing an Actorney to do any lawful Act in the Stead of anothers As to give Seifin of Lands, receive Delite Cours Repercon stand althout stilled

In Cales of Letters of Attorney, the Authority given thereby must be strictly pursued, or the Act; of the Autorney shall be weid; And where he does. less than the Authority mentions, it is the fame; but if he doth more, it may be good for so much as he had Power to do. Pleud. 475. A Letter of Attorney is made to deliver Livery and Seisio of Lands, between certain Hours, if the Attorney doth it before or after; or if it is to be in a Capital Meffusge, and he does it elsewhere in another Part of the Land, Oc. the Act of the Artorney is

Some Letters of Attorney are revocable, and fome not for and the Power of Attorney generally determines by the Death of the Party giving it.

It is the Nature of this Infrument to give the Atplish the Thing intended to be performed; and it is reasonable Perlons should have a Right to Delegate others to de lawful Acts for them, on Account of Sickness, Ablance, &c. But bare Authorities mined

### Pai The Restor of the Law

thorities are to be purfued with Stridness, because to some Parties to whom given have no Manner of

ment? And because there can be no greater Reproach to a Cove system than to have corrupt and wicked Magifird 1916 Hard by the King; this Conception being fix'd in the Minds of the People,

METBEL fignifies a scandalous Report of any Mair, foread abroads or otherwise unlawfully Published; and is called famosus Libellus; or an infamous Libel.

Every Libel is made either against a private Man, or against a Magistrate of publick Person: If it be made against a private Person, it deserves a severe Publishmentob for though the Libel be only against one, ever lit tuvites all of the fame Family, Kindred or Society, to Revenged and fo tends by Confequenes to Quarrels and Diffurbance: And if it be against a Magistrate, or other publick Person, that is fill a greater Offence & as Ithis concerns not only the Breach of the Peaces but is a Scandal to the Governmente. (x Reb. 10k hopen) eled entrepour

bilt is not Material wherharithe Matter of the Li-Bet Be return falle, if Profecution be by Indict mention Paformation & but in Action on the Cafe. one may justify that it is true of Printing or Writ ting may be Libellous, though the Scattlal is not charged in direct Terms, but ironically; or although there be only the first and last Letter of the Name, thethe Jury will find it to Point at a particular Perford and the Couttiver, Progurer and Publisher word and Libely ared punishable. 5. Hob. 219. o Meddren, yp. Rep. 199 finisgs or boll non ob ad

A Libeller may be indicted at the Common Law, and according to the Quality of his Offence, he fhall be punish'd by Fine and Imprisonment; and in extraordinary Cases, by Pillory, Oc. 3 Just 174. In Rep. 125.4 Replace their Regs. I. A. Libels

Libels flow from Malice, and Interrupt the Peace of the Kingdom; wherefore they delerve Punishment: And because there can be no greater Reproach to a Government, than to have corrupt and wicked Magistrates substituted by the King; this Conception being fix'd in the Minds of the People, by infamous Libels, may be the Gaule of Tumults and Sedition, to the great Distarbance of the Common wealth.

Every Libel is made either admin a private Man or againft a Magintoptations If it be

inde the special design of the special special

A Writ of Right for Recovery of Land is to be profecuted within fixty Years. A Writ of Formedon for any Title to Lands in Ese, within twenty Years after the Title accru'd. Actions of Debt, upon the Case (except for Words) of Accounts (except for Merchandise) of Detinue, Trover and Trespass, are to be commenced within his Years after the Cause of Actione Actions for Assault and Battery, within four Years: And Actions on the Case for Stander, within two Years, and not after.

Time mentioned by the Statute for Limitation of Actions, it is a good bringing of the Action in due, time; and he is not barred by the Statute. It the he do not Declare against the Party within the Time limited by the statute. Pract. Reg. 135.

There is a Law Maxim, Vigilantibus non Dermientibus
Leges subveniunt; The Laws help those as are
Watchful, not those as are Sleepy and Negligent.
All Persons are so prosecute their Rights whilst

in Remembrance, that the Proof of them may be Indispurable. Common Debts may be forgot by Length of Time, and more Demanded than is due; for that it is fitting a Time should be limitated at the Profession. And in Cases of Treffic pass, Sec. profession after a long Time, implies more Malice in the Profession. By the taking out a Writ, in Nature of filing an Original, a Suit is commenced within the Meaning of the Statute.

Where a Maning another with This established to gives

The remaind of the send of the gold of visual Theory and Sciling is a Delivery of Rollellion of the Lands Tengments, on other corpored Things of the long that hat a Right thereunto the being at Ceremony used in the Convergers of Lands Teven nements. On where an Estate of Freehold pall at eth.

The Manner of Delivery of Scilin is thus; If it he in the open Field, where there is no Building of Houle, then one prefert must take the Deed, and declare to the Standers by the Caule of their Meeting there, and read the Deed to them, or Declare the Effect thereof; rand then, being fealed, the Party takes the Deed in his Hand, with a Clod of the Earth, and a Twig or Bough (if any there) and delivers the lame to the Feoffee, or his Attorney, in the Name of Sciling according to the Effect of the Deed But if there he a Houle, or Building upon the Land, then this is done at the Door, none being left at the same Time within the Houle, and it is delivered with the Ring or Key of the Door. Terms de Ley 484.

The Words of Livery are as follow, viz. I A.B. do deliver to you C. D. Possession and Seisin of this Messurges &c. To Hold to You, your Heirs and As-

#### 1814 The Stavent's Cahrpalkons

fred, according to the Intent and Meaning of this Deed and purches Common Debts may be Indiputed to

If a Man deliver a Deed of Feofiment upon the Land, is the Name of Seile of all the Lands contained in the Deed, this is a good Livery. But if a Man only deliver the Deed of Feofiment upon the Land, without mentioning, that it is in the Name of Livery, Cc. this Amounts to no Livery

of the Land. I Inft. 48, 56.

Where a Man makes a Deed of Feoffment to another, without Condition; and when he gives Livery, he Clogs the Estate with a Condition; in this Case the Estate shall be subject to the Condition of Co. Liv. But if a Deed of Feoffment is void in itself, the Livery upon it is also void. And Livery to pass a Freehold, to commence in future, is void; it must pass a present Freehold. Hob. 1790.

Livery is a Testimonial of the willing Departure of antibilitin who makes it, from the Thing whereof the Livery is made, and the willing Acceptance of the other Panty of all that whereof the other hath Devented himself. If Livery is not mentioned, Delivery of a Deed upon the Land hath addistrent Oped by an annual Education to the Livery, one to establish the Deed; belong the Livery of the Deed therefore it is subject to the Condition annexed to it. When Livery referreth to a Deed that bath no Effect in Law, it cannot work Secundary formum & Effect in dation of the Livery, that being void, the Livery as of Consequence void. If Livery Works at all, it must take Effect presently, and not in future, to because there can be no giving a future Possession.

The Words of Livery are as follow, viz. I A.B. do let ver in you C. D. Pellessiand Suffin of this amsdigament field and the four pour their and Affine,

tions, the Churt may entreafe the Damages upon View of the Maillem, and Affidavits of Expenses,

### The Life and Member of Wery Subject are we'er

Aihem fignifies a Corporal Injury, whereby a Man lofeth a Member, so that he is less able to Fight and Defend himself, as by putting out a Man's Eye, breaking his Scull, striking off his Arm, Hand, or Finger, cutting off his Less or Poot, Oer And Castration is Maihem; but outting off the Ear is no Maihem, though for this Offence an Indictment will lie.

By Statute 5 H 4 cutting out the Tongue, or putting out the Lyd of any Person is Felony: And by a later Statute, if any Person shall on Purpose, and of Malice forethoughs, cut out or disable the Tongue, put out an Eye, cut off or shit the Nose, or Lip, or cut off or disable any Limb or Member of another, with Intention in so doing to Maim or Disfigure him, it is Felony without Benefit of Clergy. 22 67 22 Car. 2. 6. 1

Clergy. 22 6 23 Car. 2. c. I.

And where a Man doth any Act of this Nature voluntarily, the Law judgeth it of Malice prepenters in Cale where a Man killeth another without Provocation. 3 Inft. 62.

Provocation. 3 Inst. 62.

By our ancient Laws, if a Person was found Guisty of Maihem, the Judgment against the Offender was to sole the like Member that the Plaintiff lost by his Means; but since it hath been punished with Fine and Imprisonment, and Damages to the Party. Co. Lit. 127.

A Man may be indicted for Maihem; or Action

A Man may be indicted for Maihem; or Action of Trespals may be brought against him for an Alfault, Battery and Maiming, Oc. And in this Action

## be Stilvene's Companion:

tion, the Court may encrease the Damages upon View of the Maihem, and Affidavits of Expences, Oc. Sid. 108.

The Life and Members of every Subject are under the Protection of the King, to the Intent they ydanamay ferve Him and their Councy, when Occa-231 a fion thall sequire : And on this Account a Man may not Maim or Disable himself; if he doth, he may be indicted and fined. The first Law making cutting out the Tongue, purting out the Eyes, 10 De a Capital Crime, was enacted, because fork gain amerly itmessatillal when Men were robbed or put out their Eyes, or cut out their Tongues, to prevent Accusation, wherefore it was made Feld-MA Injury to a Person, especially when done of Manq Sografice. 10 And Gommon Mathem being a Trespass out steyond Affault, larger Damages are given for it, than Affault and Battery. Long ue, put out a or hip or ent off or difable any himb or Member of another, with . Strumpaque dolar to Maim or Dangue him, it is relong without Benefit of

Spinprife fignifies in our Law the taking or who otherwise might be committed to Prison, upon Security given that he shall be forth-coming at a Time and Place assigned, Old Nat. Br. 42. It is more large than Bail; for it may be where one is never Arrested or in Prison; whereas no Man is Bailed he that is under Arrelt or in Prison: And he being confined by his Sureties, as in the Case of Bail. But his Sureties or Mainpernors shall forseit their Recognizances, &c. if he do not appear. fauly Battery and Maining Oc. And 1971 13 By an ancient Writ of Mainprise, those who are
Bailable, and have been refused the Benefit of it,
may be delivered out of Prison. And Mainprise
and Bail were originally ordained in Favour of
Liberty, so very Precious in the Eye of the Laws
of this Kingdom.

# If any being Marry any other Perfon, the termer apairts of Wife being hving,

Arriage, is the lawful Joining of Man and Woman in a constant Society of Living together.

In Matrimony there is a Conjunction both of the Bodies and Minds; and in contracting Matrimony, the Consent of the Mind is principally regarded: And therefore it is said, that the Consent, and not the Copulation, makes the Marriage: But Bedding is necessary to Consummation of Matrimony. A Woman by the Common Law cannot consent to Marriage before she is of the Age of Twelve Years, nor a Man till the Age of Fourteen; and if they Marry before, they may at that Age difagree to to the Marriage, and marry again to others. Co. Lit. 33. 2 Inst. 684.

All Persons may lawfully Marry, that are not prohibited by the Levitical Degrees, or otherwise by God's llaw: The Son of a Father by another Wise, and the Daughter of a Mother by another Husband, Gc. may Marry with each other; and also Cousin Germans. And if a Man say to a Woman, I promise to Marry Thee, and if thou be content to Marry me, then Kiss me, or give me thy Hand, and the Woman do Kiss, or give her Hand accordingly, Spousals are thereby Contracted. Or if he solemnly deliver a Ring, and put it on the Woman's fourth Finger, if the willingly accepts the same,

fame, and wears it, the Parties are prefumed to have mutually conferred to Marry. Swind. 69,

If a Woman promise to Marry a Man, in Writing, and asterwards refuse to Marry him; or if a Man promise a Woman, and refuse to Marry her,

Damages may in either Case be recovered.

If any Persons being Married, do Marry any other Person, the former Husband or Wise being living, they will be Guilty of Felony: But where a Husband or Wise shall be absent beyond the Seas seven Years, the one not knowing the other to be Living; or Persons Married shall be Divorc'd, the Marriage is declared void; or made by Persons within Age of Consent, Oc. In these Cases it will not be Felony. Stat. I Juc. 1.

License, or Publication of the Bans of Marriage.

License, or Publication of the Bans of Marrimony, are required in Marriages; and Clergymen Marrying Persons without them, incur a Penalty of

We man by the Common saw 8 were not look

dame.

Nature; and the Confent of the Mind is regarded in Contracts, because the Mind only can law-fully give Consent: But to Consummation of Marriage, Copulation is requisite, and by the Patrice being in Bed together, the Law presumes it. There are Signs of Consent to Contracts of Marriage, which are effectual in Liaw, as the Woman thereby tacitly agrees to the Propolitions of the Man. Non-performance of Marriage-Contracts, incurs Damages, because by depending on such Promises, a Man or Woman's Fortune may be hindered with others. Having two Husband's or Wives, is Criminal, as it is against Nature's Law, would encourage Licenticusness, and breed Confusion in Families. License or Bans are to be had for Marrying Persons, to prevent clandessime Marriages, second Marriages, &c.

#### a Barketel

A Market is a Liberty granted to a Town or Place, for fetting up and opening Shops for Buying and Selling of Goods, occase to grant to

Fairs and Markets are held by Grant from the King, or by Prescription. And where the King grants to any one a Market or Fair, he shall have as incident to it a Court of Pie-powder, & Allo every one that hath a Market ought to have a Pillory and Tumbrel 1 Co. Infl. 220. Toll is paid for Things sold, and Standings in Markets: And Sales there are to be in an open Place, proper for the Goods sold, must be for a valuable Consideration, and not be fraudulently between two, to bar another. Toll is to be paid where required, and the Sale not be in the Night, but between Sun and Sun, &c. 2 Infl. 713. 15 Rep. 83.

In London every Day of the Week, except Sunday, is a Market-overt. Sale of Goods upon Sunday, though in a Market, &c. will not alter the Property of fluid and are sellogoom. To amond the property of fluid and are sellogoom.

Markets have been allowed for the more commodious Provision of such Things as the Subject wanteth, and are Franchises, to which a Court is incident and belonging, to do justice therein, and a
Pillory, &c. for the Punishment of Offenders.
Toll is paid in Markets for a double Reason, that
Contracts may be publicatly made, and to reimburse the Lord the Charge of keeping the Market.
And Contracts and Agreements for Sale there, to
be good and lawful, must have all the Qualities
to guard against Fraud, &c. which by the Law are
required.

#### Monopolies.

A Monopoly is an Allowance of the King by his A Grant, Commission, or otherwise, to any Person or Persons, of or for the sole Buying, Selling, Making, Working, or Using of any Thing, whereby others are restrained of any Freedom of Liberty which they had before, or hindred in their lawful Trade. 3 Inst. 181.

All Monopolies and Commissions for the sole Buying, Selling and Making, &c. of Goods and Manusactures, are declared void, by 21 Jac. I. e. 3. And Persons grieved thereby shall recover creble Damages and Costs. But this Act doth not extend to Inventors of new Manusactures, who have Patents or Grants for Terms of Years; nor to any Grant or Privilege for Printing; or to Corporations, Companies of Trade, &c.

and Corporations and Companies of Trade have been always encouraged.

Grants of Monopolies are against Law, for they generally tend to the Intercst of private Men, and are against the Publick, whose Interest it is, that Trade should be Free, and all Arts encouraged: But it is reasonable the Inventors of New Manufactures should have Encouragement beyond others, because of the extraordinary Charge they are at in bringing their Inventions to Perfection. And Companies of Trade have certain Privileges allowed them, in Regard they carry on great Defigns in Merchandise, at great Hazard, and which require a United Body to Support their Expence.

## Mottgages.

A Mortgage fignifies a Pawn of Lands or Tenements, or any moveable Thing, laid or bound

for Money borrowed.

Mortgages are made several Ways; as by Lease for a long Term of Years, Lease and Release, Assignment, &c. And in them is inserted a Proviso, that if the Money be paid at the Day agreed, the Deed is to be void: Until Failure in Payment, the Mortgagor holds the Lands; and if Failure be made whereupon the Mortgagee Enters, yet the Morgagor hath an Equity of Redemption, and may call the Mortgagee to Account, &c. Lit. 332.

1 Inft. 205. 2 Ventr. 365.

The Interest in Law, in Lands mortgaged, is in the Mortgagee before Forseiture. A Mortgagee is esteem'd in Possession on executing the Mortgage; and if the Money be not paid, whereby the same is Forseited, he may bring Ejectment without actual Entry, which is necessary where a Condition is to be deseated. The Heir, Executor, &c. of a Mortgagor coming within the Time limited, may pay the Money, and save the Forseiture. Co. Lit. 206. 2 Lill. 203. And Executors are to have Money due on Mortgages, except the Heir be particularly named; and where the Heir is named, if the Day be past, it shall go to the Executor. I Co. Inst. 210.

In Equity, where Lands are thrice mortgaged, the third Mortgagee may buy in the first Incumbrance, and shall hold against the second Mortgagee, unless he satisfy the Money paid by the third Mortgagee to the first, and also his own which he lent on the last Mortgage. 2 Vent. Rep.

M

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338. But by Statute, If Persons having once mortgaged Lands, morgage the same a second Time, without discovering the first Mortgage, they shall forseit their Equity of Redemption, and the second Mortgagee may Redeem, &c. Stat. 4 & 5 W. & M. c. 16.

Upon the Mortgagor's paying the Interest of the Money borrow'd, Mortgages continue a long Time,

without diffurbing the Poffession or Parties.

A Mortgagor hath Equity of Redemption, after Failure is made in the Proviso, on Payment of the Money, because the Mortgage is made only for the Payment of the same; but if he doth not do it in convenient Time, he may be foreclosed his Equity by the Mortgagee. A Mortgagee hath Interest in Law in the Lands, because he hath as it were purchased the Lands upon good Consideration; as the Law will intend; and 'tis not certain whether the Mortgagor will Redeem, and if he do not Redeem, the Estate is absolute in the Morgagee. Heirs, &c. may pay the Money, for they have an Interest in the Condition of a Mortgage. But Executors more represent the Testator than the Heir, to be entitled to Mortgage Money due And when the Day is past, it is as if no Person had been expressed. And paying the Interest of Money, renews a Mortgage, by the Mortgagee's Acceptance of it.

# Murder and Mandaughter.

Urder is a wilful and felonious Killing of another upon prepenfed Malice. And prepenfed Malice is either Express or Imply'd; Express, when it may be evidently Proved there was formerly some Ill Will: Imply'd, when one Kills another suddenly, having nothing to defend himself, as going over a Stile, or the like. 3 Inst. 51.

The Crime of Murder may be committed in divers Manners; by Weapon, Poison, Crushing, Bruifing, Shooting, Smothering, Strangling, Starving, Oc. And if an Infant be laid under Leaves or Trees, and suffered to be destroyed by Vermin; a fick Man laid in the Cold, whereof he dies; if a Person stir up a Dog, or other Beast, accustom'd to Bite, or do Mischief, knowing it to be such, and Death enfues, these are a Killing. And in Case of Wounding, if the Death be within a Year and Day after the Wound given, it is Murder. Pult. 122. If any Person shall Stab another, that hath not at that Time any Weapon drawn, or that hath not first Stricken, the Party which Stabs is Guilty of Murder, if the Person die within six Months following. H. P. C. 47. Stat. 1 Jac. 1.

In all Cases Malice makes the Murder; and no Words or Gestures, the never so Reproachful, are a sufficient Provocation to extenuate the Crime; neither is it, in the Common Law, of any Signification, who begins the Quarrel, or gives the first Stroke: But if angry Words pass between two Persons, and one of them pulls the other by the Nose, whereupon the Person assaulted, Kills him immediately, it is only Manslaughter, being a sud-

den Quarrel. Kel. 55, 131, 135.

If a Man, without any Provocation, Kill another, this is express Malice and Murder, tho' it be sudden. And if one executes his Revenge upon a sudden Provocation in such a cruel Manner, with a dangerous Weapon, as shews a malicious and deliberate Intent to do Mischief, and Death ensues, it is express Murder; for he that doth a cruel and voluntary Act, doth it of Malice prepense in the Esteem of the Law. Kel. Rep. 128, 133, 64. If one Resolves to kill the next Man he meets, and

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does kill him, it is Murder, tho' he knew him not, and here Malice is implied. 9 Rep. 81.

Where two Persons fight after a former Quarrel, it shall be presumed to be out of Malice. And if two Men sall out in the Morning, and meet and sight in the Asternoon, and one of them is kill'd, this is Murder; for their Aster-meeting is of Malice. If a Man, having a malicious Intent to kill another, in the Execution of Malice kill a Person not intended, as if one of Malice Prepense shoot at another Person, intending to kill him, and the Ball kills one to whom he bore no Malice, he shall be adjudged a Murtherer. Kel. 27. Plowd.

If two or more Assemble to do an unlawful Act, as to beat a Man, to commit a Riot, Rob a Park, Oc. and one of them kills a Person, this is Murder in all; but not in such as come by Chance. And by our Law, all that are present Aiding and Abetting him that doth the Murder, are Principal Offenders, though they give no Stroke. Kel. 87.

H. P. C. 31, 47.

If a Constable or Watchman is kill'd doing his Dury, or any that comes in Aid of the King's Officer, whilst in Execution of his Office, it is Murder. And if a Bailiss is executing a lawful Warsant, and is killed, there Malice will be imply'd; but if the Bailiss doth that which is unwarrantable, as if he break open a House, to Arrest in Civil Cases, and is slain in the Attempt, Malice shall not be implied, to make it Murder. 3 Inst. 52. 4 Rep. 40.

And where a Bailiff, &c. hath no Authority, it is not Murder to kill him in the above Cales.

Murder is contrary to the Law of Nature, and of God; and a Man, who unlawfully takes away the Life of another, is unworthy to Live. Of all the Ways of Murdering, that by Poison is the most Hareful, because of the Difficulties to guard against it. The Spirit and Principle of Malice, is a Devilish Spirit, which makes the Murder. No Provocations are allowed where there is Malice, because such might be easily brought about to effect Revenge. All Cruelty is obnoxious to the Law, and adjudged Malicious. Refolving to Kill the next Person a Man meets, shews Malice to Mankind. A former falling out, where there is Time to allay the Heat, implies Malice. If a Man kill another not intended, his malicious Intent shall be connex'd to the Person, and it shall be judged Murder; for it can be no Excuse, that he intended to kill another, all Killing being unlawful. Where a Person is kill'd, and many are present, unlawfully Assembled, it is Murder in all of them; because their Presence made the Murderer more bold, and the Person slain more Fearful; the Consequence of which was the Cause of his Death: And the Stroke of him that woundeth, is in Law the wounding of all the others. All. lawful Authority is to be submitted to, and resisting it, is relifting the Justice of the Commonwealth; but a Man's House, which is his Castle, is not to be forced to make Arrest in Civil Gales but for Crimes where the Publick is concern'd.

## Mandaughter, &c.

Mansaughter is the killing of another on a fudden Quarrel: Or the committing of a voluntary and unlawful Act, without any deliberate Intention of doing it.

An unlawful Act, with an ill Intent, is Murder; and without an ill Intent, Manslaughter. If one shrow a Stone over a Wall in a Place where

M 3

People

People often resort, or at another in Play, and kill a Person, it is Murder, if done with an evil Intention to hurt. And if a Man shoot off a Gun in a City, or Town, &c. which must put the Life of a Man in Hazard, and one is kill'd, it is Manslaughter. If a Man shooting at the Tame Fowl of another, which is an unlawful Act, kill a Stander-by, it will be Murder: If he be shooting at Wild Fowl, &c. and he is not Qualified to keep a Gun, it is Manslaughter; and if he be Qualified to keep a Gun, which makes the intended Act lawful, it is only Chancemedley. 3 Inst. 56.

Where two meet together, and striving for the Wall, one kills the other, this is Manslaughter. And if a Man, without any Provocation is Assaulted by another in any Place whatsoever, in such a Manner as plainly shews an Intent to Murder him, as by discharging a Pistol, or passing at him with a Drawn Sword, &c. he may justify the killing such

an Affailant. 3 Inft. 51. Benl. 47.

If a Man is taken in Adultery with another Man's Wife, and the Husband presently kill the Adulterer, this is only Manslaughter. And a Woman killing a Man attempting to Ravish her, it is sufficient. 178: Oro. Car. 544.

Felons, not suffering themselves to be Arrested; and Trespassers in Parks, Forrests, &c. not surrendring, but desending themselves, killing them

is Justifiable. 3 Inft. 221. Bro. Coron. 59.

If any Persons see others Fighting, and do not use their Endeavours to part them, if one of them is kill'd, the Lookers on may be indicted and fined.

Noy Rep. 50.

The Crime of Manslaughter is less heinous than Murder, because it is done in a Heat, without Malice precedent. The Will and Intention is the chief Thing in Crimes, without which they may

be only Accidental: And there is a Difference between lawful and unlawful Actions. A Man may justify killing another, who Attempts to kill him; and a Person may kill an Adulterer taken with his Wife, because of the great and uncommon Provocation, and Invasion of Property: Likewise a Woman may kill a Man attempting to Ravish her, it being afterwards too late to make Refistance. In some Cases Killing may be justified, and excusable; but all Persons are to endeavour to keep the Peace. When any Person is killed, by any Means, the Coroner is to fit upon the Body, and Enquire of his Death, to see that the Deceased came fairly by his End.

In Civil Trespasses, the Law doth not regard Malice, as it does in Capital Cases. If a Man be kill'd by Misadventure, this has a Pardon of Course: but if a Person be wounded only, an Action of Trespass lies, tho' it be done against the Party's Will, and he shall receive the same Punishment by the Law, as if he had perpetrated it of Malice. The Law makes a Difference between killing a Man upon a present Heat, and upon Malice forethought; but if a Man give me flanderous Words, whereby my Reputation and Good Name is injur'd. altho' the Words are utter'd on a fudden Provocation, or of fet Malice, in Action of the Cafe, I shall recover Damages alike. Staundf. 16. Bac. Max. 31.

This is built upon a Law Maxim, that That doth excuse and extenuate an Offence in Capital Causes. which doth not work the same in Civil Cases. And in Civil Actions the Law chiefly takes Notice of the Damage of the Party wrong'd, and not of the Malice. The Reason of the Law's exculing in capital Canses, is in Favour of Life.

#### Paturalization.

Aturalization is where an Alien born, is made

the King's Natural Subject.

A Stranger Naturaliz'd by Act of Parliament, may inherit Lands by Descent, as Heir at Law, as well as have them by Purchase: But an Alien that is made Denizen by Letters Patent, tho' he is enabled to purchase Lands, he is not thereby enabled to inherit the Lands of his Ancestors, as Heir at Law, but as a Purchaser he may enjoy them. I Inst. Stile 179.

By a Statute of King James 1. No Person is to be Naturaliz'd until he hath received the Sacrament of the Church of England, and taken the Oaths of Allegiance and Supremacy. 7 Jac. 1. c. 2.

When an Alien is Naturaliz'd, or made Denizen, he is under the King's Protection, before which Time, he can enjoy Nothing in England.

particular Privileges as their Birth-right. And the a Foreigner here is liable to our Laws, he is not under the Protection of the King, till made a Subject; which an Act of Parliament, passed by Consent of the whole Nation, may well do, and make him as a Free-born Englishman, to partake of the Common Laws of the Land.

## execut De Erent Regnum.

TE Exeat Regnum is a Writ to restrain a Man from going out of the Kingdom, without

the King's Licence. F. N. B. 85.

It may be directed to the Sheriff, to make the Party find Surety that he will not depart the Realm; and on his Refusal, to commit him to Prifon; or may be directed to the Party himself, and if he then goes Abroad, he shall be fined. 3 Co. Inft. 178. And this Writ is granted on a Suit's being commenc'd against a Man in the Chancery, when the Plaintiff fears the Defendant will fly to fome other Country, and thereby avoid the Justice of the Court; in which Cafe the Party muft give Bond in a large Penalty to the Master of the Rolls, to yield Obedience to it, &c.

A Ne Exeat Regnum has been granted to Stay a

Defendant from going to Scotland.

It is highly Reasonable that Subjects, who are the Strength and Support of any Kingdom, should be restrained by the Ruling Power, from leaving the same, especially with ill and defigning Views of Injustice to others: And notwithstanding Scotland be not out of the Kingdom, yet it is out of the Process of the Court, and within the same Mischief.

# Pobility.

Tobility compriseth all Dignities above a Knight; fo as a Baron is the lowest Degree

All Nobility is granted and created by the Crown, and is generally Hereditary. But by Act

of Law it may be for Term of Life, without any actual Creation; as if a Duke take a Wife, by the Intermarriage, the is a Dutchess in Law, and fo of a Marquess, Earl, or Baron: There is a Diversity between a Woman that is Noble by Defcent, and a Woman that is Noble by Marriage: for if a Woman that is Noble by Descent, marry a Man that is under the Degree of Nobility, the remaineth Noble still; but if she gaineth it by Marriage, she loseth it, if the marry again under the Degree of Nobility. And yet if a Dutchess by Marriage, marry a Baron of the Realm, the remaineth a Dutchess, and loseth not her Name, & he de cæteris. 1 Inft. 16. 4 Rep. 118.

A Nobleman, who is a Peer of the Realm, as if he be a Lord of Parliament, shall be tried by his Peers, upon an Indictment for Treason, Murder, or other Felony: But one, tho' Noble, if he be not a Lord of Parliament, as a Lord of Ireland. Son of a Duke, Earl, Oc. shall be tried by Freeholders. And in Appeal of Felony, Oc. a Peer of the Realm is to be tried by Freeholders. Also Indictments of Peers for Treason or Felony, are to be found by Freeholders of the County, tho' they mal plead before the Lord High Steward, on Removal of the Indictment by Certiorari. 1 Inft. 156.

2 Inft. 49. 3 Inft. 28.

A Countels by Marriage, or Descent, tho' she cannot fit in Parliament, yet is the a Peer of the Realm, and shall be tried by her Peers. And neither a Lord, that is a Peer of Parliament, por a Countels, shall be arrested for Debt or Trespass. 6 Rep. 52.

But the Estates of Peers may be Sequestred, on Process of Summons, &c. when they refuse to ap-

pear and answer. Stat. 12 W. 3.

All Honour flows from the King, who is the Fountain of Honour: He hath the Creation of Nobility, which is conferr'd on those who for their eminent Services and Abilities deserve well of their Country. A Woman married to a Nobleman, is of the same Condition with her Husband: If a Noble Woman by Marriage, marry an Ignoble Man, she ceases to be Noble. But where a Woman is Noble by Descent, her Dignity and Title are annex'd to her Blood. A Peer of the Realm shall be tried by his Peers, at the Suit of the King, by Indiament, &c. Though in Appeal of Felony, he shall be tried by Freeholders, because it is at the Suit of the Party: And it is to be observed, though the Privileges of Peers are great, that on Trial of a Peer, the Peers are not Sworn, no Challenge is allow'd, and the Verdi& is good, if the greater Number, being twelve. agree to it. It is being a Lord of Parliament makes a Peer, but a Lady is a Peer, though she do not fit in Parliament, because no Woman may fit there, and her Husband or Ancestor was a Peer. The Person of a Peer is not subject to Arreft, in Respect of his Dignity; and the Law prefumes he hath Lands sufficient, in which he may be Diffrain'd.

# Qulances.

TUfance is where a Person makes any Encroachment upon, or does any thing to the Annovance of another.

And Nulances are either of Publick or Private Nature: Where a Hedge, Gate or Post is erected in or cross a Common Highway; Ditches are Dug, or Logs of Timber laid therein, Oc. thefe are publick Nusances, for which your Remedy is by Indictment. But turning a Water-Course running to a Man's House, stopping up Lights, &c. or if a Man

a Man be interrupted in a private Way, these are private Nusances; and Action on the Case is the proper Remedy. 2 Roll. Abr. 137. 1 Inst. 56.

A Brewhouse, erected in a Place where the Busines cannot be carried on without greatly incommoding the Neighbourhood, may be a common Nusance: And so in the like Case a Glass-house, &c.

1 Hawk. P. C. 199. Building a Smith's Forge near
a Man's House, and making a Noise with Hammers, has been held a Nusance, for which Action
lies. 1 Lutw. 69. And Action may be brought
for a Nusance in erecting a Tallow Furnace so near
the House of another, that his Family becomes unhealthful thereby: Also where a Hogsty is kept
near a Person's Parlour, whereby he loses the Benesit of it, &c. Cro. Car. 367. 2 Roll. 140.

Throwing Garbage, &c. into Ditches or Common Shores, within or near any Town, is a Nunece. And if a Ship be sunk in a Port or Haven, if it be not removed, it is a Common Nusance.

21 Car. B. R. 2 Lill. 244.

A Common Nusance may be abated or removed by those Persons who are prejudiced by it. On Indictment for a Nusance the Party shall be fin'd and imprison'd; and on Action, Damages are given,

Asion of the Case may not be brought for Publick Nusances, because it would promote Multiplicity and Infiniteness of Suits; for if one Man might have an Asion, all Men might have the like; but one Indistance serves for all. But there is a Difference between a Private Way and a Common Highway; as the one usually belongs to a particular Person, and the other to the Parish or Vill. Although the Trades of a Brewer, Blacksmith, Tallow-Chandler, &c. are Necessary for the Publick, yet they must be properly used, so as not to be a Nusance and Injurious to the Neighbours.

bours. The finking of a Ship in a Port is a Common Nusance, for the Trade of the Kingdom is impeded by it. Common Nulances may be removed, because they are common and injurious to all Persons: And Gaming-houses, Bawdyhouses. &c. are one Kind of common Nusances.

#### Daths.

A N Oath is a calling Almighty God to Witness that the Testimony of a Person is true: and it is called a Corporal Oath, because the Party when he swears, toucheth with his Right Hand the Holy Evangelists, or Book of the New Teftament.

It is used in all Law Proceedings, to determine what is Just and Right. And a Witness may have two Oaths given him, one to speak the Truth of fuch Things as the Court shall ask him, and the other to give Testimony in the Cause. If there be Oath against Oath, by Plaintiff and Defendant, the Oath of the Plaintiff shall be believed. 4 Inft. 278. 2 Lill. 247.

Officers of Justice are by the Common Law bound to take an Oath for their due Execution of Justice. And by Statute, all that bear any Office. Civil or Military, Ecclefiastical Persons, Counsellors, Attornies, Oc. are to take the Oaths to the Government, or be incapable to execute their Offices and Employments, and to forfeit 500%. Ce.

13 W. 3. I Geo. I. .

And by a late Law, all Persons whatsoever, having Estates in Lands or Tenements, are to take the Oaths, or Register their Estates, or be liable

to Forfeitures. Stat. 9 Geo. 1.

Oaths are a Security which the Law hath invented for promoting of Truth and Justice: And not only the Witnesses in a Cause have an Oath given them to speak the Truth, but also Officers are to be sworn to execute their Offices truly, so careful is the Law to have Justice done to all Parties. The Oaths to the Government, are of Allegiance, Supremacy and Abjuration; the first requires Obedience and Loyalty to our Sovereign; by the second the King is acknowledged Head of the Church; and by the third, the King's Right to the Crown is afferted against the Pretender to these Realms: All which were contrived for the King's Honour and Safety, and to preserve good Order in the Government of the Kingdom.

# Dbligations.

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A N Obligation is a Bond containing a Penalty, with a Condition annex'd for Payment of Money, Performance of Covenants, or the like. The Person who Enters into such Obligation is called the Obligor, and the Obligee is he to whom it is Enter'd into.

An Obligation is good, though it want a Date, if it be Scaled and Delivered. And if an Obligation be Scaled by two Persons; and afterwards the Name of another Obligor is inserted or interlined, and he by Consent of all Scals the Bond,

it is good against all. 2 Lev. 35.

If an Obligation contains falle Latin, as Johannes for Johannem, Septuagesimo for Septuagenta, Oc. it may be good; but if the Words, at the End of the Condition, That then this Obligation to be word, be omitted, the Condition will be void, but not the Obligation, which in this Case remains single. 10 Rep. 33.

Reading

#### D2, The Reason of the Law. 175

Reading an Obligation, & false, to an illiterate Person, will make the same void. 2 Co. 11.

The Scaling and Delivery, and not the Date, is the Essence of a Bond or Deed; for if that can be proved, though not precisely when, the Deed will be good. If Words have the Shew and Countenance of Latin, they shall not make void an Obligation, from the Intention of the Parties. But where a Bond or Deed is read otherwise than it Purports, it is not a Man's Deed, although he Seal and Deliver it, because he agrees not to the Contents, but only to what is read.

# Offices,

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Office signifies a Function, by Virtue whereof a Man has some Employment in the Affairs of another; as of the King, or other Person.

No Officer or Minister of the King is to be ordained or made, for any Gist, Favour, or Affection; nor shall any be put into Office but such as are sufficient. And if any Officers touching the Administration of Justice, or concern'd in the King's Treasure, &c. shall Bargain or Sell any of the said Offices, or take any Money or Reward for same, they shall forseit their Estates, and the Perfon so Buying, &c. be adjudged incapable to hold the same Office. 12 R. 2. & Stat. 5 Ed. 6.

No Judicial Office is to be granted in Reverfion, before the same becomes void: But Ministerial and Secular Offices may be granted in Fee, Tail, for Life, &c. As the Offices of Marshal of England, Chamberlain of the Exchequer, Warden of the Fleet, &c. 11 Rep. 4. Davis 45.

If an Office concerning the Administration, the King's Revenue, or the Benefit or Safety of the Subject.

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Subject, be granted to a Man that hath not Skill and Knowledge to execute it, the Grant is void.

1 Inft. 3.

The Sale of Offices is a great Seandal to any Government; for a Person who buys an Office, it is strongly to be prefumed, will by undue Means make his Purchase good, to the great Prejudice of the Publick. And where Persons are advanc'd for Fayour or Affection, their Qualifications are not supposed to be equal to those who are promoted for their Merit. Wherefore these Dispositions have been prohibited by Law; and for that Men of Skill, Knowledge, Ability, and Integrity only, can execute Offices as they ought. Grants of Reversions of Judicial Offices are restrain'd; because tho' a Person may be of Ability to execute a Place at the Time of the Grant, yet, before the Office falls, he may become unable to perform it; and these Offices are annex'd to the Perfon; but Ministerial Offices may be executed by Deputy.

#### Dideal.

ORdeal was an ancient Trial of Criminals in the Time of the Saxons; and was two Ways, by Fire and Water. If the Offender were a Freeman, he was to go Bare-footed and Blindfold over nine Plough-shares fire-hot; or if he were of Servile Condition, then he should be put in hot scalding Water, &c. and if they escape unhurt they were to be acquitted; and if not, should be condemn'd. Terms de Ley 462. 9 Rep. 32.

The Manner of this Trial was thus: When the Criminal being arraign'd, pleaded Not guilty, he might chuse whether he would put himself upon God and his Country, by Trial of twelve Men, as is practised at this Day, or upon God on-

ly: and therefore it was called the Judgment of God. But this Ordalian Law was abolished here by Parliament, Anno 3 Hen. 3.

Trial by Ordeal is a Kind of Purgation in the Canon Law. And our Saxon Ancestors thought it an Appeal to God for the Justice of a Cause, and verily believed the Decision was according to the Will of Divine Providence. But because of the great Superstition of it, this Trial has been long fince difus'd, and Trial by Jury only ordain'd.

# Dutlawzy.

Utlawry is where a Person being called into the Law, does (after an Original Writ, and three Writs of Capias, Alias and Pluries, return'd by the Sheriff, Oc.) contemptuoufly refuse to ap-

pear.

A Person outlaw'd is out of the King's Protection, and Deprived of the Benefit of the Law: And if he be outlawed at the Suit of another in a Civil Cause, he shall forfeit all his Goods and Chattels to the King; if upon Felony, then all his Lands and Tenements which he hath in Fee, or for Life, and his Goods and Chattels. Bratt. lib. 3.

In ancient Times Outlawry was esteemed in Law a grievous Punishment, so that none was Outlawed but for Felony, the Punishment whereof was Death: And in those Times an Outlawed Man was faid to have Caput Lupinum, because he might be put to Death by any Man as a Wolf: This was the Law before the Conquest; but in the Beginning of the Reign of Ed. 3. it was ordained, That it should not be lawful for any Man, but the Sheriff (having lawful Warrant therefore) to put any Persons outlaw'd to Death, altho' it were for Felony,

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Felony, upon Pain to suffer the like Punishment, as if he had kill'd any other Man. Bract. lib. 5. 2 As. pl. 3. 2 E. 3. tit. Coron. 148. 1 Inst. 128.

About Bracton's Time, Process of Outlawry was given in Actions Quare vi & armis; and since that, by sundry Statutes, in divers other Actions, viz. in Debt, Account, Covenant, Actions upon the Case; &c.

As all Persons live under the Protection of the Law, so they ought to yield Obedience thereto: And those who will not submit to the Law, it is reasonable should not have the Benefit of it. An Outlaw for Felony is a very great Criminal; but for avoiding Inhumanity, in former Times, in killing him as a Wolf, wheresoever found by any Persons, a Statute was made, that none but the Sheriff should put him to Death, and that by lawful Warrant; for the Sheriff is the King's Officer to execute Justice, and his Warrant alone Justifies him in it, without which it is Felony, because he hath no Authority by Law for what he does, and the Law only can justify the putting a Man to Death.

Goods and Chattels are forseited in Civil Cases in Outlawry, for the Reason following, which is given in our Books.

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Because by the Party's absenting, no Remedy is to be had against him; and as he ought to answer by Law, it is a Penalty to make him Answer.

Pardons.

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fendant in the Appeal as Ist. see.

## 

by the King where he is Protect

A Pardon is the Remission of some Crime or Transgression committed against the Laws of the Land.

The King, by the Common Law, had Power to pardon all Offences; but this Power hath been reftrained by Statute, particularly in Cafes of Murder. He may still pardon Treason, Felony, Manflaughter, Crimes and Mildemeanors, and Fines and Forseitures incurr'd by such Offences : But in Wilful Murder, to pardon an Offender is contrary to the Laws of God and Man: And where an Appeal may be brought by the Subject, by the Laws of England, a Murderer could never be pardon'd. 2 Inft. 316. A Charter of Pardon is no Bar to an Appeal of Murder. And if the Party be outlawed, oc. and the King pardon him, the Appellant appearing on a Scire fac. may pray Execution notwithstanding. H. P. C. 251.

Our Statutes enjoin that no Charter of Pardon be granted for Murder, &c. but only where one killeth another in his own Defence, or by Miladventure. That no Pardon of the Death of a Man. or other Felony be granted, but where the King may do it confishent with his Coronation Oath. The Offence is to be specified in Pardons: No Pardon of Treason or Felony shall pass without Warrant of the Privy Seal. If the Offence be found Wilful Murder, the Pardon is not to be allowed : And in Appeal of Death the King cannot Pardon.

2 6 14 Ed. 3. 13 6 16 R. 2.

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Not only in Appeal of Death, but of Rape, Robbery, &c. the King cannot Pardon the Defendant in the Appeal. 3 Inst. 237.

There is no Crime, except Murder, but may be pardon'd by the King where he is Profecutor, as he generally is in criminal Cases, and the Judgment is for him: And by the King's Act of Pardon, the Party is reinstated in all his Civil Rights, and purged from the Crime whereof he was Convicted, with the Penalties thereof, so that in the Esteem of the Law he is an innocent Man: But in Case of Murder, the King cannot pardon, because Murder, and taking away the Life of a Man, is fo great an Offence, that none may pardon it, but the Author and Giver of all Life; the our Laws make it only in Appeal of Death, and this by Reason it is at the Suit of the Party, and not of the King; and the Appellee is to have Judgment of Death. The King may not pardon but confishent with his Coronation Oath, by which he is sworn to cause Law and Justice to be done to all Men: And a Pardon of Wilful Murder is not to be allow'd, because it is against Law.

#### Parcenerg.

Parceners are the Issue Female, which (in Default of Heirs Male) have equal Portion in the Inheritance of their Ancestor; and are in Judgment of Law but one Heir.

If a Man hath Issue two Daughters, and the Eldest hath Issue three Daughters, and the Youngest only one Daughter, here all these Daughters, after their Deaths, shall inherit, but the three Daughters of the Eldest shall have no more than the Daughter of the Youngest, viz. a Moiety of the Lands. 1 Inst. 162.

Parceners have one entire Estate of Freehold, as long as the Land remains undivided, in Respect to Strangers; tho' between themselves, to many Purpoles, they have feveral Freeholds; for the one may convey her Part to the other, &c. But Partitions of Lands may be made by Parceners, either Voluntary, or by Compulsion, by Writ De Partitione facienda. In voluntary Partitions, the eldest Par-cener shall chuse first, the second next, &c. every one in Turn, according to Seniority; and this Privilege goes to the Heirs, &c. of every Parcener: And yet, if the Sheriff is to make Partition, he may Affign the Part to the Youngest first, and the Eldest last, if he pleaseth. 2 Inft. 365. Lit. Sect. 248.

A Partition of Lands ought to be made according to the Quality, and the true Value of the Land, and to be equal; but a Partition by Parcerners of full Age, &c. binds them for ever, whether it be equal or unequal, if it be made of Lands in Fee. In Case of Entail'd Lands. &c. it shall be only Binding to the Parties themselves for their Lives, and not their Islue, unless it be equal. which the People, that

Co. Lit. 166.

Parceners cannot make Severance of the Estate of Inheritance in the Land, as the one to have it for one Time, and the other for another; but each is to have her Part absolutely. In Coparcenery, if the Estate in Part of the Purparty be evicted, that shall avoid the Partition in the Whole: for Partition implieth a Warranty and Condition in Law (for this Purpole) to enter into the Whole: And for it hath been adjudged both in the Case of Partition and Exchange. 1 Co. 87. 1 Inft. 173.

The its must have Parish Officers and Parochial -99 md gri mi alla ya N 3evan vem bes Children

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Children of Parceners can enjoy no greater Share of Lands, than she was to have thre' whom they claim; fo that three Daughters of one Parcener shall have no more than one Daughter of the other. Coparcenery is not severed by the Death of any of the Parceners, but the Part, &c. of the Person dying shall descend to ber Heira Though the eldest Sister hath the Preference, where they make Partition amongst themselves, yet when the Sheriff is to make it, the Writ doth not command him to give any Preference, but to make equal Partition. If unequal Partition be made of Entail'd Lands, the Issue of the Parcener, that has the leffer Part, and is injur'd by it, may after her Decease disagree, and Enter and Occupy in Common, the Part allotted the Aunt. An Agreement to sever the Estate of Inheritance in the Land is impossible and void, for that they may not be alter'd. A Priviry remains in Case of Evidion, to entitle Entry on the Whole.

# Parities.

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lands; &c.

A Parish, at this Day, is the Circuit of Ground, in which the People, that belong to one Church, do inhabit.

To is faid that Parishes were ordained by the Laseron Council, before which every Man being
ebliged to pay Tithes to a Priest, was at Liberty
to pay them to what Priest he pleased; but then
came the Council which made the Parishes, and
decreed that every Person should pay his Tithes to
his Parish-Priest. Hob. Rep. 296. And since, by
Statute, every Person is to repair to his ParishChurch every Sunday, under certain Penalties.
Stat. 1 Eliz. c. 2.

A Parish must have Parish-Officers and Parochial Rights, and may have many Vills in it; but generally

nerally a Parish shall not be accounted to have more than one Vill, unless the contrary be shewn. Hill, 21 Car. 1. B. R.

By Statute 43 Eliz. c. 2. every Parish is obliged to provide for its own Poor. And where a Highway lies in a Parish, the Parish must repair it. 2 Lill. 272.

It has been held, that Parishes were instituted for the Ease of the People; and the Reason why Parishioners must come to their Parish Churches is, because the Parson, for whose Maintenance Tithes are paid, having charg'd himself with the Cure of their Souls, that he may be enabled to take Care of that Charge. Most Parishes have but one Vill within them; and therefore shall be generally so intended. It is most convenient and equal for the Parishioners in every Parish, to provide for the Poor, and repair the Ways within the same.

# Peace.

PEACE fignifies a quiet inoffensive Carriage and Behaviour towards the King and his People.

The Law is the Preserver of the Common Peace of the Land: And Persons of Ill Fame, and Common Disturbers of the Peace, may be obliged by a Justice of Peace to Enter into a Recognizance for Good Behaviour: Sureties of the Peace may be demanded by a Justice, particularly for Persons committing Affrays, Assaults, Batteries, Fighting, Quarrelling, Rioting, threatning to Kill, Beat or Wound others, &c. And for the Sasety of Persons, our Law hath provided, That any Man standing in Fear of another, on making Oath before a Justice of Peace, that he goeth in Danger or his Na

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Life, the Justice shall compel the other to be bound with Sureties, to keep the Peace. 4 Inst. 180.

Although Justices of Peace have not express Authority given them by their Commission, to take Recognizances for keeping the Peace, yet the Law allows them that Power; for they are thereby constituted Conservatores Pacis, and to cause Men to keep the Peace, hear and determine Offences committed against it, &c. And the Common Law also giveth Power to the Sheriff to take a Recognizance for Keeping of the Peace, as he is also Conservator Pacis, and to that End hath the Guard and Custody of the County committed to him. F. N. B. 81. But I think this last is alter'd by Statute.

A Justice of Peace ought not to bind any Person to the Good Behaviour upon a general Information. But on Oath made of Misbehaviour, a Justice may require a Bond or Recognizance, with a great Penalty of a Person for his keeping the Peace, if he see cause for it, in Regard that the Party to be Bound is a dangerous Person, and likely to break the Peace, and do much Mischies. Prast. Reg. 388.

The Court of B. R. &c. will bind one to the Peace, if they see Cause to do it, altho' there be no Oath made by any Person against him that is to be bound, that he goeth in Fear of his Life of

him. Ibid.

Where one is bound to the Peace in the Crown-Office, they will keep him bound during Life, unless upon Application made to the Court, they think fit to Discharge him.

The Peace is of the highest Concern in any Kingdom or Government: It is the Foundation and very Band of Society; and in all Cases the Law provides for the Sasety of Persons. In Affrays,

Sec. the Peace is vifibly broken, to demand Surety of it; but in Case of Threatnings, Oath must be made of the Danger, that it may appear it is not demanded out of Malice, but from a just Cause of Fear. As Justices have Power to hear and determine Offences against the Peace, they have consequently Power to bind over, and do every Thing in order thereto. A general Infor-mation carries with it no Certainty to bind a Man to the Peace: But where a dangerous Person does any particular A& against the Peace, of which Oath is made, there cannot be too much Caution used in taking Security for preventing the Progress of it, If the Court of B. R. be satisfied there is good Cause to bind a Man to the Peace, without an Oath, the Oath may be dispensed with. And Motion is to be made in B. R. to take off Security of the Peace in the Crown-Office, because it is an Office under the Jurisdiction of that Court. Find to the land

# adi em dab das em **Perjury.** Tova es productiva

not shrenor we I

PErjury is a Crime committed where a Lawful Oath is administred by one that hath Authority, to any Person in Judicial Proceedings, who swears falsly in what is Material to the Issue or Cause in Question: And by the Common Law is punishable by Fine, Imprisonment, Pillory, &c.

By the Stat. 5 Eliz. c. 9. Persons committing wilful Perjury, shall forfeit 20 l. suffer six Months Imprisonment, be disabled to give Evidence, and be set on the Pillory, and have both their Ears nailed. And Suborning a Witness to give Testimony in any Court of Record, concerning Lands or Goods, &c. shall forseit 40 l. and incur the other Punishments supra. Also Persons Guilty of Perjury or Subornation, beside the Punishment already inslicted by Law, may be sent to the House

of Correction, or be transported for seven Years,

Oc. by the Statute of 2 Geo. 2.

An Indictment for Perjury may be preferr'd against one for taking a salse Oath rashly, and for want of Consideration, though the Party that took it did it not maliciously, and he may be convicted and punished thereupon; but the Fine ought to be more Moderate where the Perjury is committed out of Rashness only, than where it is done out of Malice. Trin. 24 Car. B. R.

A false Oath taken before a Person that hath not Authority by Law to give the Party his Oath, in the Cause wherein he hath deposed, is not Perjury. And where a Man makes a false Oath, which is nothing to the Purpose in the Cause, and the Party against whom made, receives no Damage thereby, there lies no Indictment for it. 4 Inst.

Perjury is a very heinous Crime, and deserves the greatest Punishment: But where Offences are committed out of Insirmity, the Law regards the Weakness of Men, and will not punish them with that Severity as Offences committed out of Malice. An Oath given by one who has no Authority to give it, is, in our Law, Coram non Function, and as if no such Oath had been made: But Quare, whether it be so in Conscience. A Man is not to suffer for that which injures no Body.

# Perpetuities.

Perpetuity in the Law, is when an Estate is design'd to be so settled in Tail, &c. that it cannot be undone or made void; or where, if all the Parties that have Interest join, they cannot bar or pass the Estate. 2 Lill. 292.

An Executory Devise of Lands, after an Estate-Tail, generally tends to a Perpetuity, though not where it depends upon one Life, &c., a Cro. Rep. 695. And a Term for Years may not be devised in Tail, with Remainders over, to raise a Perpetuity: But a Limitation of a Term in Reversion, to several Persons in ese, doth not extend to create a Perpetuity; if it be to Persons not in ese, it is otherwise. Moor 495.

Care ought to be taken not to devise a Term for Years in Tail; but such a Term may be assigned to Trustees to permit the Issue in Tail, &c. to re-

ceive the Profits.

These Perpetuities are odious in Law, because they tie up the Hands of all Posterity from altering the Act done, be the Cause for it never so great. And it is a Rule which hath destroy'd Perpetuities, that an Estate cannot be made to cease for a Time, and then rise again; or to deprive a Tenant in Tail by Condition of the Power of Alienation.

## Pleas and Pleadings.

PLEA signifies that which either Party alledges for himself in Court, in the Cause there depending to be tried; but it is generally taken for the Defendant's Answer to the Declaration of the

Plaintiff.

Pleas are divided into Pleas of the Crown and Common Pleas; Pleas of the Crown are all Suits in the King's Name for Offences committed against his Crown and Dignity, and also against the Peace, as Treasons, Felonies, &c. And Common Pleas are those that are agitated between common Persons, in Civil Cases. Then there are Pleas in Abatement of the Writ, and in Bar to the Action;

Action; also a Foreign Plea, where Matter is alledged to be triable in another Court: And Pleas are General or Special. Finch 362.

Where a general Plea is pleaded in B. R. the Attorney ought to fet his Hand to it, and then the Issue is join'd between the Parties; but if it be a Special Plea, there must be a Counsellor's Hand fet to it. Pleas to Civil Actions are as follow, viz. in Trespass upon the Case, &c. Not guilty; in Debt upon Bond, Non eft fattum poin Debt upon a Contract without Specialty, Nibil debet per Patriam; in Action of the Cafe upon Assumpfit, Non Affumpfit; in Covenant, Performance of Covenants, &c. These are general to the Declaration. And in all Cases where a Deed is only voidable at the Time of the Action brought, as for Infancy, Dures, &c. the Defendant ought to plead Judgment, fi Actio, and not non est factum. Special Pleas must set forth the Matter pleaded at large, with apt Conclusion to the Declaration or Action. And if a Defendant bath Cause of Justification or Excuse, he must not plead the General Issue, Not guilty, lest upon the Evidence it be found against him; but he ought to plead the Special Matter, and To confess and justify what he hath done. Co. Lit. 282. 5 Rep. 119.

In good Order of Pleading a Man must plead, 1st, To the Jurisdiction of the Court. 2dly, To the Person; and therein first to the Person of the Plaintiss, then to the Person of the Desendant. 3dly, To the Count. 4thly, To the Writ. 5thly, To the Action. And if the Desendant misorder any of these, he loseth the Benefit which the Law allows him. In common Actions, where the Desendant may plead the General Issue, &c. he ought so to plead, that the whole Matter in Question may come to be tried; or else the Plea will not be good.

1 Inst. 303. Kitch. 98. Pasch. 23 Car. B.R.

A Man can never plead any Thing afterwards, which he might have pleaded at first. The Law refuseth double Pleading; and a double Plea is such a Plea, that one fingle Issue cannot determine all the Matter issuable that is contained in it, but the Defendant is put to a double Answer. General Pleading, though in Matters of Fact, is difallow'd: as in Covenant to make an Effate by the Advice of another, it must be shewn what Advice was given, or it will not be good. And if the Defendant Plead a Dilatory or Frivolous Plea, the Court at the Plaintiff's Motion, will order him to plead fuch a Plea by fuch a Time, as he will fland to. Hob. 295. Mich 22 Car. B. R. And by Stat. 4 & 5 Ann. no Dilatory Plea shall be received in any Court of Record, unless the Truth of it be proved by Affidavit, or probable Matter be shewn. A Foreign Plea must be ingrossed in Parchment, and be put in upon the Oath of the Defendant; that is, he must swear that his Plea is true, or it hall not be received.

If the Plaintiff alters his Declaration, after the Defendant hath pleaded to it, the Defendant may alter his Plea. The Defendant may amend his Plea, altho' it be three Terms after it was pleaded, if it be not Entered, and he will pay Cofts. And if the Defendant plead an insufficient Plea. and Issue is join'd upon that Plea, and a Verdict given upon that Issue for the Defendant, the Plaintiff shall not afterwards take Advantage of the Insufficiency of the Plea. Mich. 22 Car. B. R.

2 Lill. 322.

The Court at this Day will not direct any Person how to Plead, tho' the Matter be Difficult, and they be mov'd to do it; but will bid the Parties Plead at their Peril. There must be Certainty in Plead-

ings, and in all Law Proceedings.

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There is no Caule can be legally heard and determined, without Pleadings on both Sides : And to a General Plea an Attorney's Hand is fufficient. it being for a common Matter; but to a Special Plea there must be a Counsel's Hand, because it is not a common Case, but supposed to be advised by Counsel, who shall maintain it if disputed. The General Plea Not guilty, &c. is not to be pleaded in a Special Case, but the Special Matter to be pleaded. A double Plea is not a good Plea, because a good Issue, which ought to be single, cannot be join'd upon double Matter; and an Issue is to be such, whereupon the Cause may be determined. Generality in Pleading has no Certainty: And the Law favours not Delays in Pleadings. &c. which put the other Party to Cofts. As Foreign Pleas endeavour to Ouft the Court of its Jurisdiction, they ought to be on Oath. By the Amendment of a Declaration, it may require a different Plea from what was pleaded, so that the Plea is Amendable. And in other Cases, the Plea may be amended in Time, on good Cause; for the Court cares not to take Advantages. It is a Plaintiff's own Fault to join Issue on an infufficient Plea, when he might have demurred to it. Counsel are to advise how to plead, and the Court is only to Judge of the Pleadings.

#### Pollellion.

Possession is where a Man Enters into Lands or Tenements descended or convey'd to him,

As where there is a Father and Son, and the Father dieth seised of Lands in Fee, and the same descends to the Son as next Heir; in this Case before Entry, the Son hath in Law a Possession; so it is of a Reversion or Remainder dependant upon a particular Estate, if the Tenant for Life die, he in Reversion before Entry hath Possession in Law. Noy 120.

If one doth make an Entry into the Lands of another, and that other, notwithstanding the Entry keeps Possession of the Lands Entred into with his Servants and his Cattle, the Entry is no Entry in Law; but if the Servants and Cattle be pur out to gain the Possession, it will be a good Entry; and he that is thus put out of Possession, if he will prove a Possession in himself after this, must prove an actual Re-entry afterwards. Brast. Reg.

525. 1 Inft. 237.

Our Law-Books tell us a long Possession establisheth a Right. Long Possession, (saith Brailon) which doth exceed the Memory of Man, sufficeth for a Right. And according to Littleton, That Measure of Time that maketh such a Possessiony Right, by which a Fee-simple may be attained, is where Things have been used so long as the Memory of Man cannot remember the contrary; that is, either by the Knowledge and Memory of Proof, or by Record, or sufficient Matter in Writing; for if there be any sufficient Proof of Record or Writing to the contrary, although it exceeds the Memory or Knowledge of any Man Living, yet it is said within the Memory of Man. Co. Lit. 115.

If Goods are taken Forcibly out of a Man's Poffession, on Pretence of Title to them, Action of Trespass may be brought, and Damages recovered; for they may not be taken from him but by his As-

fent, or by Order of Law. 2 Lill. Abr.

Possession in Law, is where there is a Right of Entry into Lands, &c. A Person actually in Possession, is to be outled by Entry; and Possession must be avoided by Possession, which is gained by Entry. A long Possession makes a Right in Law, and it is for the Certainty of Titles: But any Proof in Writing, &c. contrary to a Possession Right, will destroy it; for Proof beyond all Things makes Titles Certain. Possession continues

nues in the Possessor till the true Title appears : And a Man may not take by Force what he believes to be his own in the Possession of another, left fuch Pretences should give a Colour to Robbers for their Plundering.

## 10 2cfcription.

Rescription is a Title acquir'd by Use and Time. and allowed by the Law, which supposes a Discent or Purchase originally. And Prescriptions are properly Personal, and therefore are always alledged in the Person of him who prescribes, viz. That he, his Ancestors, or all those whose Estate he hath, &c. or of a Body Politick or Corporation, they and their Predecessors, have had or used, &c.

1 Inft. 114.

There is a Difference between a Prescription, Custom, and Usage. Prescription hath Respect to a certain Person, who by Intendment may have Continuance for ever, Oc. But Custom is Local, and always applied to a certain Place, as Time out of Mind there has been fuch a Custom in such a Place, &c. And Prescription belongeth to one. or a few only, whereas Custom is common to all: Now Usage differs from both, for that may be either to Persons or Places; as to Inhabitants of a Town to have a Way, Oc. 2 Nelf. Abr. 1277.

A Prescription is to be Time out of Mind; it must have a lawful Commencement, and peaceable Possession and Time are inseparably incident to it. 1 Co. Inft. 113. Prescription cannot be annexed to any Thing but an Estate in Fee, which must be fet forth; but it is always applied to incorporeal Inheritances. A Man cannot make Title to Land by Prescription, only to Rent, or Profits out of

it. 4 Co. Rep. 31.

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One may make Title by Prescription to an Office, Fair, Market, Toll, Way, Water, Rent, Common, Park, Warren, Franchise, Court-Leet, &c. 2 Roll. Abr. 270, 271.

I apprehend Prescription to be against those Opinions that hold all Liberties are derived from the Crown. And what is confirming of this, If a Court to hold Pleas held by Prescription be confirmed by the King's Grant or Letters Patent, this doth not destroy the Prescription, which the Court may be held by as before. Length of Time will make a Prescription, from a Presumption in Law, that a Possession cannot continue quiet, if it was against Right, or injurious to another.

## Prefentation.

Is the Act of a Patron offering his Clerk to the Bishop, to be instituted in a Benefice of his Gift.

When the Ordinary hath examined the Clerk, and finds him Qualified, he admits or approves him, and then Institutes him in Form; and when the Bishop hath given Institution, he Issues out his Mandate to the Archdeacon to Induct the Clerk, who thereupon does it personally, or Commissions some Neighbouring Clergymen for that Purpose. And the Induction is performed by the Delivery of the Ring of the Church-Door, or a Bell-Rope, &c. to the newly instituted Clerk, that he may ring the Bell, &c. and thereby shew that he hath taken Corporal Possession. Dyer 221. F. N. B. 47.

Presentation may be by Word or Writing; and if a Feme Covert hath Title to Present, the Presentation must be by Husband and Wife. An Infant may Present of whatsoever Age. If a Patron do not Present within six Months after the Church becomes void, the Bishop is to Present; and if the

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Bishop do not Present within fix Months afterwards, the Archbishop is to Present; and if the Archbishop do not Present within a further fix Months, the King shall Present by Lapfe. The King hath the Right to Present to all Dignities and Benefices of the Advowson of Archbishops and Bishops, on the Vacancy of Sees: And upon the Promotion of a Clerk to a Bishoprick, the King hath Right to Present to such Dignities or Benefices as the Person was Possessed of before such Promotion. And in the King's Right, the Lord Chancellor Presents to the Benefices belonging to the Crown, under the Value of twenty Marks (and usually of and under twenty Pounds) per Ann. in the King's Books of First-Fruits and Tenths. F. N. B. 33. 1 Inft. 135. 4 Inft. 356.

If any Person shall, for any Sum of Money, Gist, or Reward, or by Reason of any Promise, Bond, &c. Present any Person to a Benefice, or Dignity, or Give the same in Respect of any such corrupt Cause, every such Presentation, and every Admission and Induction thereupon, shall be void; and the Crown shall Present for that Turn; and the Person that shall give or take any such Sum of Money, &c. or take or make any such Promise or Bond, shall forfeit and lose double the Value of one Year's Prosit of such Benefice; and the Person seeking and accepting the Benefice, shall from thenceforth be disabled to have and enjoy the same.

Stat. 31 Eliz. c. 6,

This Law was made against Simony; and a Contract may be made Simoniacally as well before as after the Church is void; for the it be lawful for any Person to buy the next Turn of a Church, when it is full of an Incumbent, generally Speaking, yet such Contracts, in some Cases, have been adjudged unlawful: As where the Money is to be paid

paid when the Church shall become void; when the Parson in Being is sick in his Bed, ready to

die, Oc. Hob, 105.

The King's Chaplains, also Chaplains to Dukes, Earls, Barons, Bishops, &c. may hold Phuralities of Livings. The King's Chaplains may have any Number of Benefices of the King's Gift, as the King shall think fit to bestow upon them; and they may hold two other Benefices with Cure. Noblemen's Chaplains may also have Licences for two Benefices, with Cure of Souls. 21 H. 8.

By Dispensation, every Spiritual Person of the King's Counsel, may keep three Benefices; and a Bishop retain some or all of the Preserments he was entitled to before he was made Bishop. Likewise by Dispensation a Man may hold as many Benefices, without Cure, of any Value, as he can get; and if he be not unqualified, as many of them, with Cure, as he can get, all of them, or all but the last, being under the Value of 8 l. per Annum in the King's Books. Hob. 148.

It is fitting there should be certain Formalities in Instituting of Clerks, &c. who have so great a Spiritual Trust. A Husband being entitled to a Presentation in Right of his Wife, is to join with her in it; and, that the Church may not be void, Insants are to Present, for their Guardians have not Power to do it for them by Law. The Benefit of Lapse to the Bishop, Archbishop, and King, is for supplying the Church with Ministers in all Cases of Neglects in Presentation: And the King, by his Prerogative, hath the Supreme Right of Patronage of all Benefices. Simony is a most infamous Corruption, because it relates to the Promotion of Officers of the Church, who cannot be bad Men, without in some Measure Injuring Religion and Government: It is therefore Simony is restrained by Law. A Benefice when void, is not to be bought; and when an Incumbent is

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in his last Sickness, it is as it were void. Pluralities are Scandalous where Livings are Large, which the Law never intended, as they make so unequal a Distribution of Benefices amongst the Clergy: And the Charge of many Livings with Cure, it is impossible for one Man to Discharge; but of Sinecures it is otherwise.

#### Pzesentments.

PResentment is a Denunciation of Jurors, or some Officers, (without any Information) of an Offence inquirable in the Court whereunto it is Presented. Lamb. lib. 4. c. 5. or it is an Information made by the Jury in a Court, before a Judge who hath Authority to punish any Offence done contrary to the Law. It is that which a Grand Jury Finds and Presents to the Court, without any Bill or Indictment delivered; and it is afterwards reduced into the Form of an Indictment. 2 Inst.

There are Presentments of Justices of Peace in Sessions, of Offences against Statutes; and Presentments in Courts-Leet, before the Steward, &c. also by Constables and other Parish-Officers, of Things

belonging to their Offices, Oc.

As Civil Actions between Party and Party, take Commencement by Writ, so criminal Profecutions against publick Offenders are begun by Prefentment and Indicament, to bring the Persons accused, and the Crimes they are charged with, before the Court wherein Presented, in order to their Punishment as the Laws direct.

## Principal and Accestary.

Principal is the principal Agent in any Crime, as in the committing of Felony, &c. And an Accessary signifies one that is Guilty of a Felonious Offence, not Principally, but by Participation, as by Command, Advice, or Concealment.

Accessaries are of two Sorts; before the Offence and after. An Accessary before the Offence or Fact, is he that Commands, Advises, or Procures another to commit Felony, and is not himself prefent when done; for if he be, he is a Principal: Accessary after the Offence, is he that receives, Affifts, or Comforts any Man that hath done any Murder or Felony, whereof he hath Knowledge.

I Inft. 57.

Every Felon is either a Principal or an Accessary: but if there be no Principal, there cannot be any Accessary. He who counsels or commands any unlawful Act, shall be judged Accessary to all that follows upon it. If I command one to beat another, and he beats him so that the other dies of it; or to kill by Poison, and he doth it by Violence: or to rob a Man fuch a Day, and he doth it not himself, but procures another to execute the Command; in all these Cases I am Accessary. But if the Command be to a Man to kill one Perfon, and he by Mistake killeth another, Oc. this differs in Substance, and it is said will not make a Man Accessary. Plowd. 475.

The Fact must be Felony at the very Time a Man becomes Accessary; as where a Wound is given, the Person must be dead before it is Felony. Persons furnishing others with Weapons to commit Felony, or relieving a Felon with Money or Vic-

tuals, finding a Horse for his Journey, &c. knowing him to be such, makes a Man Accessary. A Servant may be Accessary in relieving his Master, being a principal Felon, or by Assisting him to Escape: And a Husband receiving his Wise may be Accessary, but if the Wise receives the Husband, she shall not be Accessary. 3 Inst. 108, 138. H.

P. C. 218, 219.

If a Principal be pardoned before Judgment, or hath his Clergy, the Accessary cannot be tried; but if the Principal be pardoned after Attainder, there the Accessary may be arraigned. If the Principal die before Attainder, is acquitted by Verdict, or if after Conviction he hath Benefit of Clergy, &c. in these Cases the Accessary shall be cleared. Where the Principal appears not, the Accessary may be put to Answer, but he shall not be tried till the Principal is Attainted. 4 Rep. 43. Dalt. 339. H. P. C. 47. But vide Statute. 1 Ann. c. 9.

In Case of Murder, Robbery, &c. if one be indicted as Principal, and Acquitted, he cannot after be indicted as Accessary before the Fact; but he may be indicted as Accessary after the Fact. If he be indicted as Accessary before, he cannot be in-

dicted after as Principal. Staundf. 105.

In the highest and lowest Offences, there are no Accessaries, but all are Principals; as in High Treason, &c. which is the highest, and Rious, Forcible Entries, Trespasses Vi & armis, &c. the lowest, under Felony. In Manslaughter, which is committed of a Sudden, there can be no Accessary before the Fact. Co. Lit. 71.

Accessaries before the Fact, in Petit Treason, Murder, Burglary, Robbery, Burning of Houses, &c. are excluded Clergy. Stat. 4 & 5 P. & M. tap. 2.

Pollons, furnificing others with Weapons to ortifer of Pelony, or relieving a Felon with Money or Vis-

TUZ:S

To be concern'd in a Felony, makes a Man a Felon, the he be not the principal Actor. But there is a Difference in being concern'd in it Before the Fact and After ; for Before the Fact, it gives the Incitement and Encouragement to it, that otherwife the Felony might peyer have been committed. If a Felony Advised ensue of another Nature, the Adviser shall be Accessary; because his Advice was to commit Felony, which makes him Accessary to all the Consequences. Tho' a Person cannot be Accessary to a Folon, unless there be Felon, and a Fat that is Felony, Receiving a Felon makes a Man Accessary; but a Wife may receive her Husband, for the is by the Law of Nature bound to receive him, and not discover his Offence, or Accuse him. Before Judgment giwen against a Principal, it doth not appear that there was any Principal, to make an Accessary, to be brought to Trial. A Man acquitted as Principal, is acquitted of all Guilt before the Principal. side cipal Fact; not of an Offence subsequent to it, for which he may be tried In ancient Times, Clergy was allowed in all Felonies, except for Robbing of Churches, but now it is taken away in many Cafes by Statute,

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brought against Officers of the Revenue for Breaking

Privilege signifies some Benefit or Advantage which one Man hath, or many Persons have, beyond others.

It is either Personal or Real: A Personal Privilege is that which is granted or allowed to any Person, against the Course of the Common Law; as Peers are privileged from Arrests of their Persons; and a Member of Parliament may not be Arrested, nor any of his menial Servants, in the Time of Parliament, nor for certain Days before and after. Also the Members of the Convocation, and their Servants, &c. have the like Privilege in

attending their Houses, &c.

A Privilege Real is that which is granted to a Place, as to a County Palatine, the Universities. &c. that those who live therein may not be call'd to Westminster-Hall, or prosecuted in any other Courts but their own: And Cities and Corporations have Privileges granted them by Royal Charter. Also Officers and Ministers of Courts of Juflice are privileged in their Persons; and those who have Suits depending, in their Attendance on the Courts at Westminster, &c. 4 Inft. 212. Crompt.

Fur. 137. 8 H. 6.

Actions may be profecuted against Persons entitled to Privilege of Parliament, after Dissolution or Prorogation, until a New Parliament is called, or the same is re-assembled; and after Adjournment for above fourteen Days. And Sequestration of the Estate of a Member of Parliament, &c. may be had, for want of Appearance and Answer, on ferving Process of Summons, Original Bill, &c. but you may not Arrest the Body. And Actions brought against Officers of the Revenue for Breach of Trust, shall not be stay'd by Colour of Privilege, though such Officer be a Member of Parliament. Stat. 12 W. 3. c. 3. 2 Ann. c. 8.

One, who was Receiver General of the Revenues of the Crown, being fued in the Common Pleas, brought a Writ of Privilege out of the Exchequer; but it was disallow'd. 2 Nelf. Abr. 1296. If a Privileged Person in one Court, do sue a Privileged Person in another Court, the Person fued shall not have his Privilege: And Attornies are to plead their Privilege. 2 Lill. 368, 369. Privilege of Actornies may not be pleaded after Bail

given, &c. 1 Salk. 2. to stadweld and to

#### Di, The Reason of the Law. 201

No Privilege is to be allow'd to one that hath an Indictment preferred against him, although he be a Peer of the Realm. Mich. 22 Car. B. R.

A Member of Parliament is free from Arrests, because the King and the whole Realm have an Interest in his Person, for the Dispatch of the Publick Affairs of the Kingdom, to which it is Reafon the Interest of Private Men should submit. But when the Parliament is not fitting, Action may be brought against a Member of Parliament, and his Estate shall be liable, the not his Person. Privilege to Places, is as it were Privata Lex, for the Government of those Places. The Attendance of Officers on Courts, is necessary for doing the Business of the Courts, which are the King's. And Persons are not to be Arrested in resorting to these Courts for Justice, which would be thereby obstructed. Where two Persons are Privileg'd they are upon an equal Footing, so as to take no Advantage of each other: And Bail put in by Attornies allows the Jurisdiction. Indictment is at the Suit of the King, against whom no Privilege is allow'd; nor is it reasonable Privilege should be granted in criminal Cases.

The Lord Mayor of London is privileged from all Actions during his Mayoralty, in Regard of his Office, except it be for Treason or Felony, &c. Siple's Pract. Reg. 502.

This is, that he may not be hindered in the Government of the City, which being the Metropolis of the Nation, is of very high Concernment in Respect of the Publick.

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Procecs.

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Process is largely taken for all Proceedings in any Civil or Criminal Action, from the Original to the End: And we call that Process, by which a Man is called into a Temporal Court, which is always in the Name of the King.

All legal Proceedings ought to commence by Original Writ, Indictment, Oc. In all Cases, when the Process concerns the King, the Sheriff or other Officer (upon Refusal after Demand to open the Door) may break open the Doors of Houses, or use other Means to get in to do Execution; but in Case of a Common Person, the Law doth not permit the Sheriff, Oc. to break into the House of a Person to execute any common Process, for the great Inconvenience that might ensue thereupons Rep. 92.

No Process shall be ferv'd on a Sunday, (except it be in Cases of Treason, Felony, &c.) if they are, it will be false Imprisonment, and the Service is void. 29 Car. 2. c. 7.

In Criminal Cases, which are against the Publick Sasety, it is sitting Houses should be broke open to make Arrest on an Offender; but not in Civil Cases, wherein, if it were permitted, on any seign'd Suit, the House of any Man might be broke open, when the Party might be elsewhere Arrested: And though Sherists are Officers of Trust, yet the Bailists under them, who have Execution of Process, are generally Persons of no Reputation. It is unlawful to execute Process on a Sunday, because all Business is prohibited on that Day; but where Treason or Felony is committed, there is a Necessity for it, that notorious Offenders may not escape unpunished.

Where any House is recovered by Real Action, &c. the Sheriff may break open the House, to deliver Possession thereof to the Person recovering by Law. 5 Rep. 91.

Because otherwise there would be no End of these Suits; and after Judgment, it is not in Law the House of the Defendant.

## Property.

PRoperty is the highest Right a Man hath, or can have to any Thing; and was first introduced that every Man might know what was his own.

The Property acquir'd in Lands, is obtained by Entry, Descent, or Conveyance: And in Goods it may be acquired divers Ways, but most commonly it is by Gift and Sale Gift is sometimes by the Act of the Party, as when a Man doth actually Give a Thing to another; and sometimes by Act of the Law, as I have observed under Gifts. Co. Lit. 352.

Lands, on the Death of a Person, descend to his Heir, and Goods and Chattels go to his Executors or Administrators, &c. He that hath the Land that lies on both Sides of a Highway, hath the Property of the Soil of the Highway, &c. and where the Sea or a River carries away a Man's Soil in so great a Quantity, that the Owner can know his Land, he shall have the Land; but if it be wasted away by Little and Little, he must lose his Property. 2 Lill. 400.

Where Goods are devised to a Person, the Le-

him by the Executor, fo that he hath the Poffeffion. Mich. 23 Car. B. R. And though by a bare Agreement a Bargain and Sale of Goods is fo far perfected that the Parties may have Action of the Case for Non-performance, yet no absolute Properry vests until there is a Delivery. 3 Salk.

Every Owner of Goods, &c. hath a general Property in them: And a Man may have a Special Property in Goods; as where Goods are pawn'd; a Man hath the Goods of another Perfon delivered to him to keep, Oc. But Wild Beafts, Deer, Hares, &c. (not enclosed in Parks, and made Tame) none can have Property in.

To violate Men's Properties is never lawful; but

to Alter and Transfer them is.

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Originally there was no fuch Thing as particular Property, but an universal Right of Use and Posfession instead of it; but upon the Increase of People, Property was gain'd by Purchase and other Means, for Securing whereof proper Laws were ordain'd: And now Property must be obtain'd either by Entry, fo as so have Possession in Fact; by Discent, to have Possession in Law, or by legal Conveyance. Also Property in Goods is to be acquir'd by like lawful Ways. And where a Person hath an absolute Property in Goods, &c. he may make what Disposition he pleases of them: And a Man who hath only a Special Property therein, may maintain an Action against any who shall unlawfully take them out of his Possession, because an Action may be brought against him for them, by the Person who is the Owner, Property is a facred Thing, which ought not to be violated: But there can be no Property in Things Fore Naslot sure, because they are properly in no One's Posfeffion.

## Protection.

PRotection is generally that Benefit and Safety which every Subject hath by the King's Laws.

Also Protection is an Immunity granted by the King to a certain Person, to be free from Suits at Law for a certain Time, and for some reasonable Cause: And there are two Sorts of these Protections, one is cum Clausula volumus, for him who is going beyond Sea in the King's Service, or who is already Abroad in the Service of the King, or for the King's Debtor, that he be not sued till the King's Debt is satisfied: And the other Sort of Protection is cum Clausula nolumus, which is granted to a Spiritual Corporation, or to a Spiritual or Temporal Person, that their Goods or Chattels be not taken by the Officers of the King, &c. Reg. Orig. 23. 3 Nels. Abr. 20.

Protections are commonly made for one Year: There ought to be Cause shewn for granting them; and if obtain'd pending the Writ, they are naught. On a Person's going Abroad in the King's Service, Writ of Protection issues to be Quit of Suits till his Return; and then a Re-summons may be had against him, &c. 1 Co. Inst. 130. 2 Lill.

398.

It is a Branch of the King's Royal Prerogative to grant Protections to the Subject, and highly reafonable they should be granted to Persons in his Service; but the Cause of granting them is to be expressed, that they may appear to be lawfully issued; and not pending any Writ to evade Justice.

#### Publick Good.

THE Publick Good is to be preferred before Private Profit; and our Law will sooner

fuffer a Private Injury than a Publick Evil.

If a Caltle that is used for the Necessary Defence of the Realm, descend to Coparceners, it may not be divided as other Houses are: And a Woman shall not be Endow'd of a Castle of Defence; but as to Castles for private Use and Ha-

bitation, it is otherwise: Co. Lit. 165.

In Cases which are for the Publick Good of the People, a Person may justify doing of a Wrong, As in the Time of War, a Man may erect Bulwarks in another Man's Lands: And in Time of Fire and Conflagration, a Person may justify the raising of an House that is Burning, for the Saseguard of the Neighbouring Houses. Plowd. 322.

Things for the Benefit and Maintenance of Trade, which by Consequence are for the Good of the Publick, and are in any Place by Authority of Law, shall not be distrained. And Bonds not to Use Trades, and of Husbandmen not to Till or Sow their Ground, are against Law, and void; for these are necessary for the Publick Good. Co. Lit. 47. 11 Co. 53.

All this is built on the excellent Maxim in our Law,

Salus Populi of Suprema Lex. Castles of Desence
are pro bono Publica & Desensione Regni, and ought
to be in the Hands of shole who can defend them.
In Time of War, &c. there may be the last Necessity for some particular Acts of Violence, to secure the Publick in general, which will very well
Justify them. And Trade, Husbandry, &c. being the only Things that enrich the Publick, it

#### Di, The Realon of the Law. 207

is against the Laws and Politicks of all Countries to restrain them. The Good of the Publick is the End and Design of all lawful Governments.

## Ducen.

A Queen is either the that holds the Crown of this Realm by Right of Blood, or the that is married to the King; the first of which is call'd

Queen Regnant, and the last Queen Confort.

In the former Signification, she is in all Construction the same that the King is, and hath the same Regal Power: In the latter she is Inserior, and a Person separate from the King; but what she hath is the King's, and what she loseth, the King loseth. Stamf. Prerog. 10.

By the Common Law the Wife of the King of England is a Publick Person, exempt from the King, and is capable of Lands or Tenements of the Gift of the King, which no other Feme Covert is; and she is of Ability and Capacity (without the King) to Grant and Take, to Sue, and be sued, in her own Name, as a Feme Sole at Common Law. Also she may have in herself the Possession of Personal Things, during her Life, or 1 Inst. 133.

To Compass the Death of the Queen is Treason by our Law. If a Queen, Wife to a King Regnant, compass the Death of the King, and declare the same by some Overt Act, she is Guilty of Treasson, as well as any other Person: And if the Husband of a Queen Regnant compass her Death, he

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is Guilty of Treason. Britton. c. 8.

Violating the Queen's Person, or the King's Eldest Son's Wise, &c. is also Treason: But the Act must be committed during the Marriage with the King or Prince: And if either of them Consents to the Adulterer, it shall be Treason in them. Stat. 25 Ed. 3. 3 Co. 9.

By the Laws of England, all Regal Power and Dignity is to be as well in a Queen as a King. Our Queens have a Prerogative beyond others, like unto our Kings; and the Wisdom of the Law would not have the King, whose continual Care and Study is for the Publick, to be troubled and disquieted with the Queen's private Matters. As the Queen is a distinct Person, by the Common Law, from the King, she may commit Treason against him; and a Queen's Husband, who is but a Subject, unless he have Regal Authority, may be Guilty of Treason against her. Deslowering the Queen's Person, &c. was made High Treason, because it destroyed the Certainty of the King's Issue, and consequently raised Contention about the Succession.

## Duo Warranto.

Ou Warranto is a Writ that lies against him, who usurps any Franchise or Liberty against

the King, without good Title. 18 E. 1.

If several Privileges are granted in a Charter, and there is a Forseiture incurr'd for an Abuser of one of the Privileges, and a Quo Warranto is brought, and Judgment upon it, this is a Forseiture of the whole Charter. Style 529. 2 Inst. 494.

The Judgment given in B. R. in Trinity Term, 35 Car. 2. in a Quo Warranto against the Mayor and Citizens of London, that the Franchise of the

#### Dz, The Reason of the Law. 209

faid City should be seised into the King's Hands, as sorfeited, was reversed and made void, and all Officers, Companies, &c. restored by 2 W. & M.

Seff. 1. c. 8.

If any Person intrude into the Office of Mayor, Bailist, &c. in any Corporation, a Quo Warranto may be brought against the Usurper, who shall be ousted and fined: And the Proceedings on Quo Warranto's are regulated for the Ease of the Subject, &c. by Stat. 9 Ann. c. 20.

Where the Privileges of a Franchise granted by Charter are misused or abused, upon a Quo Warranto brought, it is a Forseiture: But the Privileges of Corporations, &c. are not to be taken away upon every slight Occasion, which is contrary to our Laws, and the Liberty of the Subject. No Office may be intruded into, for all Officers are to be legally chosen and appointed.

## Rape.

RAPE is where a Man hath Carnal Know-ledge of a Woman by Force, and against her Will. And it is Felony, without Benefit of

Clergy, in the Principal and his Aiders.

The Carnal Knowledge of a Woman Child above the Age of ten Years, against her Will, or of a Female under the Age of ten Years, either with or against her Consent, is Rape; but there must be Penetration or Emission, otherwise it will be only Assault and Battery. If a Woman yields to the Violence, and such her Consent was forced by Fear of Death or of Dures, this does not mitigate the Crime of the Ravisher; nor is it any Excuse that

the consented after the Fact 3 Inst. 60. Stat. 18 Eliz. But if the Woman Conceive, it has been formerly adjudged to be no Rape. 2 Inst. 190. His

P.C. 117.

In Cases of Rape, the sooner the Complaint is made, the better; and the Law allows forty Days. At the Common Law, Rape was Felony; afterwards it was looked upon as a great Misdemeanor only, but punishable with the Loss of Eyes and Privy Members; and the Stat. Westm. 1. reduc'd it to Trespass, punishable by Fine and Imprisonment; but by Stat. Westm. 2. c. 34, it was again made Felony, Excluded of Clergy. 3 Inst. 180.

The Chastity of a Woman, which is her greatest Glory, should on no Account be violated, the Consequences of it being terrible; therefore Rape is made a Capital Offence. A Female under ten Years of Age, hath not Understanding to Consent to any A&, much less to a criminal A& so highly to her Injury. Unless there be Penetration, the Body is not so abus'd as to be Rape; and without Emission a Woman is not Defiled. The Law supposes a Woman cannot Conceive, except the confeat to the Enjoyment of the Man. It is a strong Presumption against a Woman that she made no Complaint in a reasonable Time, whereby the Fact might be the casier proved. The Punishment of Rape has undergone great Variations in Ages paft, in Proportion as our great Law-Makers have detefted Crimes of this Nature.

#### Records.

R Ecord signifies an authentick Testimony contain'd in Rolls of Parchment, and preserv'd in a Court of Record, wherein are involled Pleas of Land or Common Pleas, and criminal Proceedings, &c. But this doth not extend to the Rolls of Inserior

Inferior Courts, the Registries of Proceedings whereof are not properly called Records. 1 Inft.

A Marter of Record ought to be proved by the Record it felf, and not by Evidence: Records being the Rolls or Memorials of the Judges of the Courts of Record, import in themselves such incontroulable Verity, that they admit of no Averment to the contrary. 1 Inft. 26. 2 Lill. 421.

A Record of a Judicial Act may be altered during the Term wherein determined, but not after. And a Record of an Issue for Trial of a Cause, may be amended in a small Matter. Sidi. 8 H. 6.

Records of Judicial Proceedings and Determinations are necessary not only as Precedents, but for avoiding future Controversies for the same Thing, and must be proved by themselves, not by Witnesses, because no Issue can be found upon them to be tried by a Jury like to Matters of Fact. The Term being accounted but as one Day in Law, any Record or Judgment may be alter d therein.

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Eculants are such as adhere to the Pope as

Supream Head of the Church,

At the Reformation, those were deem'd Recufants who disputed the Authority of the Crown in Causes Ecclesiastical, and denied the King's Supremacy; but the Acts of Parliament made against Recusants, particularly the 35 Eliz. describe a Recusant to be one that does not repair to some Church or Chapel to hear Divine Service. Afterwards the Receiving the Sacrament of the Church was made a farther Test of Conformity: And by the 25 & 30 Car. 2. a Declaration against Transfubstantiation is required, to distinguish Popish Reculants from Protestants. At this Day all Persons are judged Popish Reculants convict, who result the Oaths of Allegiance and Supremacy, or Abjuration, and are liable to forseit their Goods and Chattels, Lands, Oc.

By the Stat. 3 Jac. 1. Constables and Church-wardens of Parishes, &c. are to present, once a Year at the Quarter-Sessions, such Recusants as shall absent from the Church a Month together, the Forseiture of which is 20 l. per Month, &c. And Justices of Peace in their Sessions are to cause Proclamation to be made, that Popish Recusants render themselves to the Sheriss, &c.

There are several Remedies given by Statute against Recusants; one for the King by Indictment, &c. and the other for a common Person, by Action of Debt, Bill, Plaint, &c. And where one is indicted on the Statutes of Recusancy, Conformity is a good Plea, but not where Action of

Debt is brought. 1 Mod. Rep. 213.

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Our Civil and Ecclesiastical Government are incorporated together, so that one cannot subsist without the other; wherefore it is sit that the King should be at the Head of, and be acknowledged by both. Also it is reasonable that the Government of any Country, which is principally supported by Religion, should establish by Law what National Religion they think sit, and annex Penalties and Forseitures to the Disturbance and Nonobservance of it, so as not to extend to Tyranny over the Consciences of Men.

Releases.

#### Releafes.

A Release is an Instrument whereby Estates, Rights, Titles, Entries, Actions, and other Things are either extinguished or transferred,

abridged or enlarged.

Whenever a Release of Lands is made, it is necessary that he, to whom made, be in Possession of some Estate at the Time of the Release: To which End a Bargain and Sale for one Year is first made, that by Virtue thereof the Lessee may be in the actual Possession of the Lands intended to be conveyed by the Release, and thereby, and by Force of the Stat. 27 H. 8. for Transferring of Uses into Possession, be enabled to take a Grant of the Reversion and Inheritance of the said Lands, &c.

Lit. 447. I Mod. 252.

If the Words in the Grant of the Lease for a Year, be only Demise, Grant, and to Farm let, and not by Way of Bargain and Sale for Money, in that Case the Lessee cannot Accept of a Release of the Inheritance until he hath actually Entered, and is in Possession; but in the other Case of Bargain and Sale, the Bargainee for a Year is immediately in Possession upon executing the Deed. A Man Lets his Land to another for Term of Years, and the Lessor Releaseth to the Lessee all his Right, Oc. before the Lessee Enter into the Land. That Release is void, as to Enlarge his Estate: But if the Lessee Enter, and have Possession then such a Release afterwards is good to Enlarge his Estate, by Reason of the Privity that is between them. I Inft. 270.

A Release shall not Enure by Way of Enlarging an Estate, unless there be Privity of Estate, as be-

By the usual Release of all a Man's Right unto Lands, all Actions, Entries, &c. are discharged, By Release of all Entries, or Right of Entry on Land, all Entry is barred; but where a Man may Enter, a Release of all Actions doth not bar a Right of Entry; nor a Release of all Entries, take away an Action. Rights that Descend afterwards, are not barred by Release of all Right, Oc. And by Release of all Actions, Suits and Quarrels, a Covenant before the breaking of it, is not Released; but a Release of all Covenants may be effectual. If the Conusee of a Statute, Release to the Tertenant all his Right in the Land, yet he shall sue Execution of the Body: And if the Body of a Man be taken in Execution, and the Plaintiff Releaseth all Actions, yet shall he still remain in Execution; but if he Release all Debts, Duties, or Judgments, he is Discharged of the Execution. 8 Co. 151. Plowd. 484. 10 Co. 50. Dyer 5. 1 Inft. 291.

A Release of all Debts discharges all Debts upon Specialties, Executions, &c. A Release of all Duties releases all Personal Actions, Judgments, Executions, Obligations, Rents, Services, &c. And a Release of all Demands, without more Words, releases all Rights and Titles to Lands, Warranties, Conditions, Statutes, Obligations, Contracts,

Recognizances, Covenants, Rents; all Manner of Actions Real and Personal, Debts, Duties, Judgments, Executions, &c. It is the most extensive and effectual Discharge of any, and includes in it all the others. Co. Lit. 291. 8 Co. 54. Dyer 56.

If a Promise be of two Parts, and he to whom it is made Releases one Part, this will amount to a Release of both Parts. A Release to one Obligor, where there are several, will Discharge the others: A Release by a Lord, to one Jointenant, shall extend to both. And if two commit a Trespass, the Release of one Discharges both. Co. Lit. 232.

In Conveyance by Release, Possession is necessary in the Releffee, as the Foundation of his Estate. By Lease of Demise, Grant, &c. till Entry a Man hath but Interesse Termini, and not Posschion of the Land; but it is otherwise in Bargain and Sale. A Release is of that Nature, being a principal Conveyance, that it will not operate without Privity of Estate. Unless a Man hath an Estate in himself, he cannot make an Estate to another. Release of Right to Lands, bars Actions, &c. which may be brought for that Right; but not of a Right that accrues after, which may not be Released before it happens. Where there is a double Remedy, as of Action and Entry, a Release of one Acquits not the other. Release of Actions doth not Discharge a Covenant before broken, because there is not any Cause of Action, nor certain Duty, before the breaking of it. On a Statute, &c. the Body is Debtor, and not the Land, but in Respect of the Body; and the Land is not charged with the Debt till Execution sucd. A Release of all Debts, Judgments, &c. Discharges an Execution; for the Debt, &c. is the Caufe of the Execution. The Reason why Release of all Demands releases all Right in Lands, Tenements, Goods, Chattels, &c. is for that by fuch a Release the Means and Remedies of Recovering them are extinct and gone, and by Confequence

fequence the Right and Interest in them. A joint Promise, Obligation, Trespass, &c. are Entire, and no Division can be made of them; and therefore cannot be Released to one, but must be Released to all.

If an Obligor make the Obligee his Executor, this is a Release in Law of the Debt. Co. Lit.

Because the Obligor hath done all he can to satisfy the Obligee, and put it in his Power to pay himfelf.

#### Remainders and Rebersions.

A Remainder signifies an Estate limited in Lands, Tenements, &c. to commence after the Estate of another expired: It is the Residue of an Estate in Land depending upon a particular Estate, and created together with the same. As if a Man seised in Fee, granteth Lands or Tenements for Term of Years, the Remainder over to another for Life, in Tail, or in Fee.

There must be a particular Estate precedent, made at the same Time, that the Remainder may depend upon it; which particular Estate must continue till the Remainder vests; and the Remainder is to commence in Possession, at the Time the particular Estate ends: The Person to whom the Remainder is limited must be capable to take at the Time it was created; and the Thing be in Esse at the Time of the Appointment. I Inst. 49.

Every contingent Remainder ought to vest either during the particular Estate, or at least eo instante that it determines. But where the particular Estate is determined by Alienation, the contingent Remainder, which depends upon it, is de-

stroy'd: Also in Cases where the particular Estate is drown'd in the Reversion, the contingent Remainder which depended upon it, is gone. 2 Saund.

383, 386.

He that takes an Estate by Way of Remainder, ought not to be Party to the Deed. If a Man make a Gift in Tail, or a Lease for Life, the Remainder to his own right Heirs, this Remainder is void, and he hath the Reversion in him. 1 Inst.

A Man in Remainder of an Estate vested, may Grant or Devise the same; and a Release made by him in Remainder, during the Life of Tenans for Life, is a good Lease. Style's Prast. Reg. 556.

A Precedent Estate is essential for a Remainder to work upon; and when that is deftroyed by Alienation, Fine, &c. before the Contingency happens, the Remainder built upon it is deftroy'd. A Thing not in Ese, but Future, may not be appointed, except it be a Use in Remainder, which by Statute may be limited without a particular Estate in Esse to support it. A Person taking in Remainder, is not to be a Party to the Deed: for others are to take before him by the fame Deed, and all the Remainders make but one Estate in Law. An Ancestor in his Life-time beareth in his Body, in Judgment of Law, all his Heirs. so that they, who are Part of him, may not take by Remainder, during his Life. If Lands be given to a Man and his Heirs, all his Heirs are fo totally in him, that he may give his Lands to whom he will. A Remainder ought to be vefted before a Person hath an Estate grantable over ; for before, there is no certain Estate.

A Reversion is the Relidue of an Estate lest in the Grantor, after some particular Estate is granted away. As in a Gift in Tail, the Reversion of

the Fee-simple is in the Donor; in a Lease for Life or Years, the Reversion is in the Lessor, Oc.

Alfo Reversion hath a double Acceptation; the one is but an Interest in the Land, when the Posselfion of it shall fall, which may be in a Stranger: and the other is, when the Possession and Estate. which was parted with for a Time, ceaseth and is determined in the Persons of the Grantees, Oc. and their Heirs, and returns to the Grantor, his Heirs or Affigns, whence it was derived. Co. Lit.

If Tenant in Tail of a Reversion, Bargain and Sell it, nothing Passeth to the Bargainee, only an Estate Descendible for the Life of the Tenant in Tail. But if one have a Reversion in Fee expectant upon a Lease for Years, he may make a Bargain and Sa'e of this Reversion for one Year, and after make a Release in Fee to the Bargainee, which will pals the Reversion in Fee to him. I Saund.

261. Mich. 1650.

When a particular Estate is granted away, the Residue must remain in some Body, which is usually the Grantor; but an Estate or Lease may be granted in Reversion, and then there may be a Reversion upon Reversion; for after the last particular Estate is ended, the Lands revert to the Granter or his Heirs. A Tenant in Tail, of a Reversion, cannot Grant Fee; but a Reversion in Fee may be granted in Fee, where there is no Estate-Tail, &c. before it, that may cut off the Reversion by Fine and Recovery.

#### Remitter.

Remitter is where a Man hath two Titles to Land, and being seised of the Lands by the Latter, that proving Desective, he is restored to the former more ancient Title.

When the Entry of a Man of full Age is congeable, (that is, lawful) if he take an Estate of the Land for Life, in Tail, or in Fee, he is thereby Remitted, unless it be by Matter of Record, or otherwise, whereby he may be concluded or estopt; but it is otherwise, where he hath but Right of Action; for in that Case, by taking such an Estate he shall not be remitted. Co. Lit. 363.

If Tenant in Tail make a Feoffment in Fee upon Condition, and dieth, and the Issue in Tail, within Age, doth Enter for the Condition broken, he shall be first in as Tenant in Fee-simple, as Heir to his Father, and consequently be remitted; but if the Heir be of full Age, he shall not be remitted. Co. Lit. 202.

The principal Cause (says Littleton) why a Tenant in Tail is in many Cases remitted, is by Reason there is no Person against whom he may sue his Writ of Formedon. 1 Inst. 349. Lit. 665. 680, Gc.

There is a Diversity betwixt a Right of Action and Right of Entry; and Entry ought to have the Preference in Remitter, as it is the highest and most immediate Right. Where Issue in Tail, being of Age, Enters for Condition broken in a Feoffment made by his Ancestor, he shall not be Remitted; for he might have had his Formedon against the Fcossec. A Tenant in Tail is Remitted, because

cause himself he cannot sue in Writ of Formedon, &c. and none is Tenant of the Frank-Tenement but himself.

#### Rents.

Rent-Service, Rent-Charge, and Rent-Seck; for the two former whereof Distress may be taken, but not for the latter, the Grantor not having the Revertion left in him, so that he must have other Revertion left in him, so that he must have other Revertion left in him, so that he must have other Revertion left in him, so that he must have other Revertion left in him, so that he must have other Reversion left in him, so that he must have the him had he must have described in him had he must have

medy. Lit. 213, 217, 233.

A Rent cannot be generally Granted out of a Piscaty, Common, Advowson, or such like incorporeal Inheritances; but out of Lands or Tenements, whereunto the Grantee, &c. may have Recourse and Distrain. And if it be reserved to a Stranger, it is not a Rent: As where a Man enfeoss another upon Condition, that he and his Heirs shall render unto a Stranger and his Heirs, an annual Rent of 20 s. and upon Failure of Payment, that the Feossor; and his Heirs shall Enter this is a good Condition, but the Sum so reserved cannot be properly called a Rent. Co. Lit. 144, 213.

Where a Lease for Term of Years or Life, or a Gift in Tail is made to a Man, reserving Rent, &c. if the Lessor or Donor grant the Reversion to another, the Rent passeth to the Grantee, altho' the Deed of the Grant of the Reversion make no Mention of the Rent; the Rent is incident to the

Reversion. 1 Inft. 317.

If a Man make a Lease for Years of Land in Fee-simple, and reserve a Rent to him and his Executors, the Rent shall determine by his Death; for

for the Heir hath the Reversion, and the Rent is

incident to the Reversion. 1 Inft. 47.

Tenant for Life lets a Lease for Years, if he so long live, rendering Rent payable Quarterly, if the Tenant for Life die before any Quarter-day, the Tenant is discharged for that Quarter; but the Rent may be made payable Monthly or Weekly, though it be not received otherwise than Quarter-

ly, Oc. 10 Rep. 127.

A Rent being reserved payable at the sour Quarterly Feasts, the Lessor may have Action of Debt after the first Day of Failure. Debt lies for Rent in Arrear, upon a Lease for Life or Years; at Common Law it lay not on Leases for Life. And Action of Debt may be brought for Part of Rent due, and a Distress taken for the other Part, so as to make both the Person and Land liable. I Inst. 47. 5 Rep. 81. Stat. 8 Ann.

Where a Lessee for Years assigns over his Term to another, the Lessor may at his Election, charge either the Lessee or Assignee; but if he receives his Rent of the Assignee (knowing of the Assignment) his Choice is determined, and he cannot asterwards sue the Lessee for the Rent. 3 Rep. 23.

24.

If Rent be behind for twenty Years past, and the Landlord gives an Acquittance for the last that is due, all the rest of the Rent in Arrear is presumed in Law to be satisfied. 1 Inst. 373.

A Distress being incident to, and the proper Remedy for Rent, a Rent may not be regularly Granted out of Inheritances where Distress is not to be had. A Rent reserved to a Stranger, by Feoffment on Condition of Entry, on Non-payment to the Feosfor, not issuing out of Lands, &c. the Stranger can have no other Remedy, but that the Feosfor and his Heirs may Enter; and if they do Enter.

Enter, then the Rent is gone for ever; and therefore such a Charge upon the Lands (faith Littleson) is not a Rent, but a Fine laid upon the Tenant, that in Case Payment be not made, his Estate is lost by Entry of the Feosfor. A Tenant may be Discharged of Rent, by the A& of Ged. where no Guard is made against it: But every Quarter's Rent is in Law a several Debt, the Reservation being Parcel of the Profits of the Land. By a Leffor's receiving Rent from an Affignee, he owns him to be his Tenant, for otherwise he would not receive his Rent of him, and Difcharges the Leffee. And accepting of the last Rent due, is the strongest Presumption that the I Whole is paid; because every Man is supposed to be forcareful, and knowing of his own Affairs, as! nor to give an Acquitance for the laft, where there is other Rent due, but for such other Rent.

#### Reptebin.

Replevin is where a Writ is brought by a Man that has his Cattle or Goods distrained by another for any Cause, but usually for Rent, who puts in Surety to the Sheriff, that upon Delivery of the Thing distrained, he will pursue his Action against the Distrainer, or answer the same at Law.

And Goods may be Replevied two Manner of Ways, viz. by Writ, which is by the Common Law; or by Plaint, by the Statute Law, for the Party's more speedy having again of his Cattle and Goods. A Replevin ought to be certain, in setting forth the Number and Kinds of Cattle Diftrained, or else it is not good. Co. Lit. 219. Stat. 1 P. & M.

The Sheriff may take a Plaint by Statute, and make a Replevin presently; and if the Cattle or Goods are not delivered upon a first Replevin,

the Party distrained may have an Alias and Pluries Replevin; and if they are driven out of the County, fo that the Sheriff cannot make Replevin. a Writ of Withernam shall go to take so many of the Distrainer's Cattle, &c. 1 Co. Inft. 145.

And if, when Replevin is brought, the Plaintiff makes Default, or is Nonfuit, the Defendant may have the Writ Retorno habendo of the Goods ta-

ken in Distress. Raym. 33.

If a Man by his Deed grant a Rent-Charge, with Clause of Distress, and grant further, that he shall keep the Goods distrained against Pledges. until the Rent be paid, yet shall the Sheriff Re-

plevy the Goods distrained. 1 Inst. 145.

Where a Lord takes the Cattle of his Tenant tortiously, and after the Cattle come home again to the Tenant, in this Cafe, although the Tenant is already possessed of his Cattle, yet shall he have Replevin and Damages against the Lord for the torsious Taking of them. F. N. B. 69.

As for Rent Diffress is appointed by Law. so Replevin is the Remedy against Distress, when it is wrongfully taken, or detained to the Prejudice of the Owner. Replevins are to fet forth the Num-ber, &c. of Cattle, because otherwise the Sheriff cannot tell how to make Deliverance: And it is just that there should be compulsory Writs, and Return of the Beafts, on the Plaintiff's failing in his Suit. It is against the Nature of a Distress to be Irreplevisable; and if People were to keep. Goods diffrain'd against Pledges, by such an Invention, Replevins, which are for the Good of the Common Wealth, would be overthrown. A Tenant may not have Action of Trespass against his Lord; and if he had not Replevin for unjust taking of his Cattle, he would be without Remedy.

## Refcous.

R Escous is an illegal taking away and setting at Liberty, a Distress taken, or a Person ar-

rested by Process of Law.

And where a Man has taken a Distress, and the Cattle distrained, as he is driving them to the Pound, happen to go into the House of the Owner, if he that took the Distress demand them of the Owner, and he deliver them not, this is a Res-

cous in Law. Co. Lit. 237.

But if the Lord distrain the Tenant for Rent before it is become due, the Tenant may justify to make Rescous, and it shall not be adjudg'd a Disseisin of the Rent. And where any Thing is distrained that is not distrainable, or one distrains in the Highway, &c. Rescous may be made, and be justifiable; but if the Distress be for good Cause, the Owner cannot rescue it; and although it be without Cause, if impounded, he may not break the Pound, &c. 1 Inst. 47, 160. 4 Rep. 11.

The Sheriff cannot return a Rescous made upon a Special Bailiff, it must be upon a known Bailiff. All unlawful Rescues are punishable at Law; but if the Writ, upon which a Defendant is arrested be naught, and a Rescous is made, there is

no Remedy against the Rescuers. 2 Lill.

The Law only is to deliver any Person or Thing in Custody by Law. But where a Lord distrains for Rent before due, the Distress is unlawful, and unlawful Acts may be resisted. Rescous must be return'd from a known Officer, to whom all Persons are to yield Obedience; and Special Bailists are not known to the People. In Civil Cases, Rescue is punishable by Fine, Imprisonment, &c.

## De, The Reason of the Law. 229

And for Criminal Matters, as Treason and Felony, it may sometimes make a Man Guilty of those Crimes, for the Law must be answer'd.

#### Right and Remedy.

A Right signifies any Title or Claim to Lands or Tenements, &c. for which a Person may have Action or Entry: And Remedy is the Action or Means given by Law, for the Recovery of such

Right.

Common Right is the Common Law: And the great Lord Coke tells us, That of such an high Estimation is Right, that the Law preserveth it from Death and Destruction; trodden down it may be, but never trodden out. And there is such an extream Enmity between an Estate gain'd by Wrong, and an ancient Right, that the Right cannot possibly incorporate itself with the Estate gain'd by Wrong, but it will rather suffer Extinguishment, than pass with it. Co. Lit. 279. 8 Rep. 105. 6 Rep. 70.

If a Man be Disseised of his Inheritance, he hath a Right of Entry on the Lands, &c. And if an Eldest Son, who is Heir to an Estate, die, and after his Death the Youngest Son, or his Heir Enters, and many Descents are cast in his Line, yet have the Heirs of the Eldest Son a Right of Entry. Also if an Heir to Lands be beyond Sea, &c. he is not barr'd of his Estate by Non-claim.

Co. Lit. 244, 262.

Remedies for Rights are always favourably extended. If Tenements are let to a Man for Term of Half a Year, or a Quarter of a Year, &c. in this Case, if the Lessee make Waste, the Lessor shall have against him a Writ of Waste, as against Tenant

Tenant for Years, &c. for he can have no other Writ whereby the Wrong done him may be remedied. The Grantee of a Rent-Charge may demand the Rent behind at any Time after due, whether the Tenant be present or no; and it is not necessary, that it should be demanded at the very Time it becomes due, for he shall have his Remedy. I Inst. 52, 153.

If a Hollander, or Person of any other Nation, buys Goods at the Port of London, and gives a Note under his Hand for Payment, and then flies into Holland; for Remedy the Vendor on Proof of the Sale, and Delivery of the Goods, before the Lord Mayor of London, shall have a Certificate from the said Lord Mayor, and the People of Holland will execute a legal Process upon the Party. 1 Inst. 38.

Where an Obligation is made beyond the Seas, and bears Date at Bourdeaux in France; to give Remedy, the Obligation may be pleaded to be made in quodam loco vocat. Bourdeaux in France, in Islington in the County of Middlesex; and there it shall be tried; for whether there be such a Place in Islington or not, is not Traversable. Co.

Lit. 261.

If two of the King's Subjects Fight in another Kingdom, and one of them is Wounded, and dies Abroad, or is Wounded in a Foreign Country, and dies here, it cannot be determined by the Common Law; for a Jury cannot try it: But it may be decided by the Constable and Marshal, according to the Civil Law. 2 Inst. 51. 3 Inst. 48.

Also it may be examined by the Privy Council, and tried by Commissioners appointed by the King, in any County of England. By Stat. 33 H. 8.

Co. Lit. 75.

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Right is a Sacred Thing, which the Law is ever careful to maintain; and tho it may be obscured for a Time, like the Sun it will force its Way thro the blackest Clouds that furround it. There is the same Antipathy between Right and Wrong, as between Truth and Falmood, fo that the one cannot Incorporate with the other. But the Law To favoureth Right, that it will always give a Remedy, Lex Semper dabit Remedium. Where a Man has Remedy against a Stranger, who buys Goods here; and flies imo another Country, it is by the Laws of Nations and of Commerce, as well as our nown Laws. If a Bond of Obligation fued here, be mader in France, it is not Traversable, because the Place where it was made is only of Circumstance, and not of the Substance of the Bond. A Jury cannot regularly Enquire of a Death, or Wound given in a Foreign Kingdom, so as to try an Offender; wherefore in fuch Cafe the Civil Law prevails, for the Maintenance of Justice.

# rior viling buts, Bouts, &c. ....

A Riot is the Forcible doing an unlawful Act, by three or more Persons assembled together for that Purpose. A Rout is where there is an Assembly of three Persons, or more, going Forcibly to commit some unlawful Act, but they do it not. An unlawful Assembly is the Meeting of three or more Persons together, with Force to commit an unlawful Act, and abiding together, tho not endeavouring the Execution of it; as to assault, or beat any Person, to enter into Houses or Lands, break down Enclosures, Oc. Lamb. 1. 2. 6.5.

A Rout feems to be a special Kind of an unlawful Assembly; and a Riot the disorderly Fact committed by any unlawful Assembly: But two Things

Q2

If divers Persons affemble together in a peace-able Manner, and after they are so Assembled, do some riotous Act, this is a Riotous Assembling; although they did not at first alsemble in a riotous Manner, but Peaceably. 2. Lill. 489. But if Persons on a lawful Meeting, sall out upon a sudden Quarrel, here being no Intention of an unlawful Act, or of any Force or Violence, it is no Riot. And Assemblies for Wrestling, playing at Cudgels, &c. are not Riotous. Dalt. 322, 323.

Justices of Peace, with the Sheriff of Counties, &c. have Power to Suppress Riots, and Arrest and Imprison the Rioters; they are to make Enquiry by a Jury, and record and certify their Proceedings, &c. 27 R. 2. At Common Law Riots are punished by Fine and Imprisonment, and if Enormous, by Pillory. And by the Stat. 19 H. 7. Rioters shall suffer one Year's Imprisonment.

By a late Statute, where twelve Persons, or more, riotously Assembled, continue together, and do not separate an Hour after Proclamation made by a Justice of Peace, &c. in the King's Name, to disperse, it is Felony without Benefit of Clergy. 1 Geo. 1. c. 6.

There is no Violation of the Perce but is Criminal in the Eye of the Law; and as Riots carry with them great Terror, being committed by an Affembly of many Persons, they are great Breaches of the Peace, and ought to be severely Punish'd. The Law says there must be three Persons, at least Assembled, or it cannot be a Riot; and where

#### D2, The Reason of the Law.

where three Persons are Assembled tumultuously, they usually increase a-pace to a great Number. When Persons assemble peaceably, if they afterwards ast Riotously, their Assembly shall be construed with a riotous Intent; and otherwise there would be no such Things as Riots, for all riotous Intentions might be concealed under a peaceable Assembling. The late Ast making Rioting Felony, was made so very Penal, with Regard to the Number of Rioters, and the great Riots that had been then lately committed.

#### Robbery.

R Obbery is a Felonious taking away of Money or Goods from the Person of another, on the Highway, in a violent Manner, thereby putting him in Fear.

The Value in this Case is not material; for if the Thing taken be but of the Value of 1 d. it is Robbery; but there must be something taken, for an Assault to Rob only, without taking Money or Goods, is not Felony, but a Misdemeanor for which a Person may be Fined and Imprisoned, &c. And if any Thing be taken from the Person of another on the Highway, without putting in Fear, by Assault or otherwise, it is not Robbery, but Felony, for which Clergy is allowed the Offender. 3 Inst. 69. Dalt. 364.

Taking away a Man's Horse standing by him, or of any Thing belonging to him, in his Presence, and against his Will, is a taking from the Person. If a Man be pursued, and endeavouring to make his escape from a Highwayman, he lets fall his Purse or Hat, and the Robber takes it up, this is a taking from his Person: And if a Thief cuts my Pocket, and my Purse falls to the Ground, if he takes up the Purse, it is Robbery, though he

lets

Jets it fall again, and leaves it there. 3 Inft. 60.

Style's Rep. 318. Dalt. 363.

If a Thief, either with or without Weapon drawn, bids a Person on the Highway deliver his Money, and he delivers it accordingly, this is a Taking to make it Robbery: And where a Person. with his Sword or Piltol drawn, bids me deliver my Money, and afterwards he prays me to give him Alms, and I give it accordingly, this amounts to Robbery. Dalt. 363. H. P. C. 71.

A Reward of 40 1. is offered by Statute for apprehending Robbers on the Highway, Burglars, Oc. And an Offender, out of Prison, impeaching two others, so as they are convicted, shall have his Majesty's Pardon. Stat. 4 0 5 W. & M. c. 8.

and 5 Ann. c. 31.

All the King's Subjects shall be protected by the Laws, wherever they are; and the Highway, which is the King's, ought to be attended with Safety to the Subject. A taking from the Person, and putting in Fear, make the Crime of Robbery; for without putting in Fear, there cannot be Violence to make this Crime. The taking away Goods from a Man in his Presence, is a taking from the Person, because the Goods in Law are not out of his Poffession. When a Person is purfued, he is put in Peril, and the taking up his Money dropt, is what the Robber intended to take from him. The Taking of the Money makes a Robbery, though it be afterwards left, because it is the very Act. Delivering Money to a Robber on any Pretence, at his Command, is Robbery, as it is done through Fear. Rewards are necessary for apprehending notorious Offenders against the Laws; and one Offender being Spared to convict two others, is a political submitting to one Evil to punish a greater.

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#### Self-Beeferbation and Defence.

W Hatfoever any one doth in Defence of his Body, it feems to be done by Law.

It is lawful to repel Force by Force; and if any one Beat or Affault me, I may lawfully beat him, if I cannot escape without Blows or Wounds. But a Defence ought to be unblameable, not to take Revenge, but to repulse the Injury. And if a Man attack another, on a fudden falling out, and before a mortal Wound be given on either Side, he flies to the Wall, or some other unpassable Place to fave his Life, and upon Pursuit of the other he killeth him, this is Manslaughter in his own Defence. Bratt. 3 E. 3.

If a Person attempt to commit Murder, Robbery, or any other Felony, a Man, or any of his Servants, &c. may lawfully Kill him: But in the Lord Coke's 2d Institute, we find a Diversity between the Defence of a Man's Person and the Defence of his Goods; for a Man in Defence of his Possession or Goods, may not justify Maining or Wounding, &c. only on Assault and Battery. 2 Inft.

216. Cro. Car. 544.

Where feveral Persons are in Danger of Drowning, by the casting away of a Ship or Boat, one Person may thrust another from a Plank, or the Boat's Side, &c. to fave his Life, and if the other be Drown'd, it is Justifiable. Bac. Mac. 25.

And if a Man steal Victuals, meerly to satisfy his present Hunger, by our ancient Laws, this was not Felony, being for the Preservation of Life. Staunf,

But this Law is become obsolete.

Nature

Nature has implanted in every Creature a strong Defire of Self-preservation: And Natural Reason permits a Man to defend himself against Danger. But there must be an unavoidable Necessity for Self-preservation, to make Killing another justifiable; and Malice is not to be coloured under Pretence of Necessity; if it be, it is Murder. Where a Man is attack'd, Defence may be made without expeding the first Blow, for that may render a Person incapable to make any Defence. There is a Difference between Defence of a Man's Person and his Goods; but where a Robber comes Arm'd, though he only Attempts a Robbery of Goods, a Man is put in Fear, and knows not his Intent, so that Defence against the worst is lawful. Where Persons are in great Danger of Drowning, they may do all Things for the Safety of their own Lives, through the great Necessity of it; and by the Confusion they are in, they know not what they do. But Theft, though of Necessity for Preservation, is not now allowed, because it might be a Pretence for other Robberies.

#### Berbants.

A Man is answerable for the Actions and Trespasses of his Servant in many Cases; but for Trespass of Battery, &c. and in Criminal Cases, the Master shall not be Charged for his Servant, unless they are done by his Commandment.

If a Man has a Servant, who is known to be fuch, and he fend him to Fairs and Markets to Buy or Sell, his Mafter shall be charged with the Payment, if the Thing which is Merchandised come to his Use. And if a Person make another his Factor, to buy Things for him, if he buys Merchandise of any, the Master shall be charged

by his Contract, though the Goods come not to his Possession. 4 E. 2. But where a Person borrows or receives Money, in his Master's Name. the Master shall not be charged, except it be done by the Master's Commandment, or it come to his

Use by his Consent. Noy Nax. 99.

By the Book call'd Doctor and Student, if a Servant make a Contract in his Master's Name, the Contract shall not bind his Master, unless it were by his Master's Commandment, or it came to his Use by his Assent. But if a Man send his Servant to a Fair or Market generally to buy for him certain Things, (tho' he command him not to buy them of any Man in certain) the Master shall be charged. Also if a Man send his Servant to the Market with a Thing which he knoweth to be Defective, to be fold to a certain Man, and he felleth it to him, there an Action lieth against the Mafter; but if the Mafter bid him not sell it to any Person in certain, but generally to whom he can, and he felleth it accordingly, there lieth no Action of Deceit against the Master. Doct and Stud. 137.

If a Servant felleth me Cloth, and warrants it to be of a certain Length, wherein it is wanting. the Action lies against the Master only, and not the Servant. In Case a Servant buy Goods in his own Name, not mentioning his Mafter, the Servant and not the Master, shall be charged in an Action for

the Money. 18 H. S.

A Man is liable for the Acts of his Servants, in Civil Cases, for it shall be adjudged his Fault to chuse Servants that would Wrong him: And there is a Maxim in Law, Qui facit per alium facit per fe. The Master shall be charged by the Contract and Receipt of his Servant, where made or done by his Command, or they come to his Use; and

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in Case of a Factor, though the Goods come not to his Possession, because a Factor is a more Publick and Trusty Person than a Servant, and better known to the People to Encourage them to sell to him. A Master's Command to sell Desective Goods to a certain Person, and to sell them generally, is very different; for to sell them to a certain Person, supposes a Design to deceive him, who may be easier deceived than Many on a Sale in general. Action lies against the Master not only for Deceits, but for Negligences of his Servant. A Person buying Goods in his own Name, they are presumed to be for his own Use, where he is not known to be a Servant.

## Sheriffs.

A Sheriff is the Chief Officer under the King, of a Shire or County, whose Office consists chiefly in the Execution and Service of Writs.

The old Sheriff of a County, is Sheriff until the new Sheriff is sworn, altho' he be chosen. And the Under Sheriff of the County ought always, after the Sheriff is sworn in his Office, to have his Deputy attendant in Court, to receive and execute their Commands, and to give Account to the Court of the Business which may fall out concerning the Sheriff and his Office; and he ought also to file a Warrant of Attorney for his High Sheriff, in every one of the Courts at Westminster, by an Attorney of each Court, otherwise an Action lies against the High Sheriff for the Neglect. 4 Inst.

A Sheriff out of his Office cannot be Fined by the Court; but for any Mildemeanor committed by him, whilst in Office, a Tip-staff may be sent for him, to bring him to Answer; also the Law allows Process of Distringas nuper Vic. to make

him appear. 22 Car. B. R. 2 Lill.

The Sheriff who begins an Execution must end it; and the Authority of the old Sheriff continues by Virtue of the Writ of Execution, fo that when he hath feifed thereon, he is compellable to Return the Writ, and liable to answer the Value according to the Return: And by the Seifure, the Property of the Goods, Oc. is develted out of the Defendant, and he is discharged. I Salk. Rep. 322.

if a Sheriff hath in his Custody divers Persons in Execution, and die, and afterwards a new Sheriff is made, the new Sheriff must at his Peril take Notice of all Executions, which are against any Person, that he finds in the Gaol; for which there is a Necessity, there being none to make Delivery of them, or to give him Notice who are in Execution, and who not; and he may keep all the Prisoners Safe until he hath perfect Knowledge of

all the Executions. 3 Rep. 73.

Where a Sheriff takes a Bail-Bond, warranted by the Statute H. 6. of two good Men of vilible Estates in the County, at the Time of taking thereof, and afterwards they become Infolvent. vet the Sheriff shall be excused. Style 587.

Every Sheriff ought to Answer for the Mildemeanors of his Bailiffs, Gaoler, Oc. No Under-Sheriff thall be Attorney in any of the King's Courts so long as he bears his Office. High Sheriffs in Affife-Time, are not to keep a Table for the Entertainment of any but those of their Retinue, nor to make any Present to a Judge; or have above forty Servants in Liveries, or under the Number of twenty, attending them at the Afsifes, under a certain Penalty. And Sheriffs are to have an Allowance on passing their Accounts;

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for which 4000 l is to be yearly fet apart at the Exchequer, for the Sheriffs of the several Coun-

ties of England.

Also the Fees of Sheriffs on executing Writs of Execution, &c. are ascertain'd and appointed: And on the Death of Sheriffs, the Under-Sheriffs are to act in their Names, till others are appointed, and be Answerable. All this is by Statutes 29 Eliz. c. 4. 13 & 14 Car. 2. c. 21. and 3 Geo. 1.

The taking the Oath of Sheriff, compleats a Sheriff in his Office; and before he is so compleated, the old Sheriff is to do the Bufiness; for there must not be a Vacancy, which might cause a Failure of Justice, for want of a Sheriff. The Sheriff is to have all his Officers under him in the Courts, &c. for whom he is Accountable; and he takes Security from them for the faithful Performance of their Duty. A Sheriff cannot be Fined by the Court when he is out of his Office. because then he ceaseth to be an Officer of the Court. All Sheriffs on Entering upon their Offices, must strictly examine into Persons in Execution, because they are Answerable for Escapes. A Sheriff is obliged to let to Bail on good Security; and therefore if the Security at the taking was good, it shall acquit the Sheriff. It is inconfiftent for One to be an Attorney and Sheriff, to fue out, and execute Process at the same Time; for it is, as it were, making a Man Judge in his own Cause. The Expences of Sheriffs are regulated by Statute, and an Allowance is made to them, that the Office, which is for the Publick Good, may not be too Burdensome: And their Fees are by Law appointed, that they may not impose upon any.

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## Slander.

SLander, which is Defamation of a Man's Character, is a very great Offence, as it may affect a Man's Life, Office, Trade and Preferment in the World.

If a Man Reproach another with a heinous Crime, that he went about to get Poison to kill the Child that such a Woman goeth with; or lay in Wait to Rob another; or procured a Person to murder him, though he were not murder d; or sought his Life for his Land. To call a Man Bastard that is an Heir; or say that a Person has the French Disease, & when he is courting a Woman; or to call a Maid Whore, or say she hath a Bastard, whereby she loseth her Marriage: To call a Merchant Bankrupt; a Doctor of Physick Fool, or Emperick; or to say of an Attorney, he deals corruptly; to call a Person salse Justice of Peace; call the Plaintiff Thief, Felon, &c. or any one a Perjured Man, Action of the Case will lie. 4 Rep. 15. Danv. Abr. 87, 103, &c.

Action of the Case doth lie against one for speaking such Words falsly and maliciously of another, as if they were truly spoken of the Party, he might be punished as a Felon, or by some Statute. But Desamatory Words, proceeding from Rashness and Heat, as where a Person in a Passion, calls another Rogue, Knave, Villain, &c. unless he apply the Words, by saying Villain to such a Man, or Knave in such an Affair, &c. will bear no Action, but shall go unpunished. And if a Man charge another, that he hath forsworn himself, it may be construed he hath forsworn himself in common Conversation; and Action is only main-

maintainable where the Words are, That he hath forfworn himself in a Court of Record. 4 Co. 13.

In obscure Sayings we are to judge according to that which is most likely, and the Sense of the Words; which may make a Justification good, against the seeming Purport of them.

And Words by Law are to be taken in mitiori

Slanders that concern the Effate, Condition and Life of a Man, are punishable at Law; and by Action considerable Damages are recoverable upon them; for some Times, by Reason of them a Man may be prosecuted as a common Malesactor; and an honest Reputation is a Character in Life dearer to all Men of Sense and Virtue, than every Thing else in it. Bur Words of Heat are excused, on considering the Frailties of Men:

And in other Cases of doubtful Speeches, the Sense of the Words is best Collected from the Cause of the Speech, and the Subject of the Matter.

# Scandatum Magnatum

THIS is Stander of a superior and more eminent Kind, spread against the Nobility, Bishops, Justices of either Bench, and other Great Officers of the Government.

Persons devising salse News of Prelates, Lords, &c. whereby any Discord may arise between the King and his People, or betwixt them and the Commons; or any Scandal may arise to their Persons, shall suffer Imprisonment: And Action of Scandalum Magnatum may be brought by a Nobleman for Slander, who shall prosecute as well for the King as himself. Stat. 2 & 12 R. 2.

The Statute of Scandalum Magnatum is a general Law. And Words spoken against Noblemen shall be taken in the worst Sense, to preserve the Honour of great Persons. For a Man to say that he hath heard, or doth not know but my Lord of P. did so and so, or cannot imagine who did it, but he, &c. being a Charge that is ill: To say of a great Man, he is a hase, wicked, unworthy Person, &c. Action lieth. 4 Rep. 13. 1 Vent. 60. 1 Mod. 232. 1 Nels. Abr. 130.

But in some Cases a Defendant may justify in Scandalum Magnatum, as for other Scandal, setting forth the Special Matter; though if the Plea be not made good, the Damages, &c. will be aggra-

vared. Co. Eng. 26.

vance the Rence-

It is not fitting that the Lives and Fame of Menatruly Great, should be subject to the Scoffs and mean Scandals of inferior Persons. And the King is concerned in the Credit of Great Men, who act by his Authority. There are certain Degrees and Orders amongst Mankind, necessary to be kept up, for the Encouragement of Virtue and the Government and Welfare of a People; and when these are violated, a greater Punishment than Common, is no more than what is just and adequate to the Offence.

# Realism of the Remody. And then it is the Other fice of the ludges syllogod by Construction as

may reprofited Miffeld

Soldomy is a carnal Knowledge of the Body of Man or Beaft, against the Order of Nature: It may be committed by Man with Man, (which is the most common Crime) or Man with Woman; or by Man or Woman with a Brute Beast. 12 Co. Rep. 36.

Some Kind of Penetration and Emission is to be proved, to make this Crime, which is Felony both

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by the Common and Statute Law, in the Agent and all that are present, aiding and abetting; also in the Patient consenting, not being within the Age of Discretion. H. P. C. 177. 3 Inft. 58.

This heinous Offence, in ancient Times, according to some Authors, was punished with Burning, though others say with Burying the Offenders alive; and it is Reasonable it should be Felony, at least, to deter the abandon'd Vicious from their abominable Practices.

# ed red and a de **Statutes**, bered and a

A Statute signifies an Act of Parliament, made by the King and the three Estates of the Realm: In which Sense it is general, extending to the whole Kingdom; or Special for the Benefit of

some particular Place or Person.

Things are to be considered. 1. What the Common Law was before the making of the Statute.

2. What was the Mischief and Defect, for which the Common Law did not Provide. 3. What Remedy the Parliament hath appointed to cure that Discease of the Commonwealth. 4. The true Reason of the Remedy. And then it is the Office of the Judges to make such Construction as may repress the Mischief, and advance the Remedy; and also to suppress such subtile Inventions and Evasions as may continue the Mischief. 3.

Such Construction ought always to be made of an Act of Parliament, that one Part thereof may agree with the Rest, and that all may stand well together. And the Preamble is a very great Furtherance to the finding out the Design and Meaning of the Statute. The Words of an Act of Parliament are to be taken in a lawful and right-ful Sense. Cases of the same Nature shall be within the same Remedy, though out of the Letter of a Statute; and sometimes Statutes shall extend by Equity to other Actions, &c. than are mentioned.

Co. Lit. 24, 381, &c.

But a Penal Statute shall not be extended to Equity in the Exposition of it; and yet it shall be Expounded, that the true Intent and Meaning of it may be known. An Act of Parliament that gives Power of Imprisonment, ought to be strictly Interpreted: But in some Cases Penal Statutes shall be taken by Intendment, and not according to the express Words thereof, especially when they are for the Suppression of Crimes and heinous Offences. 8 Rep. 120. 11 Co. Rep. 44.

Where a Statute gives a particular Remedy for any Thing, it shall be generally presumed there was no Remedy before at the Common Law. An Act of Parliament in Affirmance of the Common Law, extends to all Times after, tho' it mentions only to give Remedy for the present. And where a Thing is granted by Statute, all necessary Inci-

dents are granted with it. 2 Inft. 235.

But impossible Clauses in Statutes are void; and so are all Statutes made against Magna Charta

declared to be, by 43 Ed. 3.

The just Construction for the Good of the Publick adds Force and Life to Statutes; and in order to this, the four Particulars I have enumerated, ought to be duly Weighed and Considered by our Judges. One Part of an Act is to be expounded by another, for that best expresses the Meaning of the Makers; and the Preamble is a Key to the Knowledge of the Whole. Acts of Parliament that inflict Imprisonment, must be strictly Interpreted, in Favour of Liberty: And Penal Statutes

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are not to extend to Equity in their Conftruction, because that would be too large and arbitrary an Exposition; but it shall be expounded so as the true Meaning shall be known, for otherwise the Exposition would be too Narrow, and extenuate the Force and Essect of the Statute. Statutes relating to the Common Wealth, are generally to give Remedy where there was none before: And Judges are bound ex officio to take Notice of all general Statutes, but not of particular Statutes, unless they are particularly pleaded.

## Strangers and Pribies.

A Privy in Law signisseth him that is a Partaker, or hath an Interest in any Action or Thing: As Privy of Blood is the Heir to his Father; Privy in Representation, the Executor or Administrator to the deceased; Privy in Estate, he in Reversion or Remainder, a Donee of a Gift, Lessee, &c. then there is Privity of Contract; and between Jointenants, Parceners, &c. And a Stranger hath a special Signification for him, that is not Party or Privy to an Act; as a Stranger to a Judgment, is he to whom a Judgment doth not belong. 4 Rep. 123. 3 Rep.

A Man maketh a Feofiment by Deed Indented, and by the same Deed it is agreed that the Feoffee shall pay to A. B. and to his Heirs, a certain Rent yearly, on certain Days; and if the Rent be not paid, then A. B. and his Heirs shall enter into the Land. In this Case, if the Feossee payeth not the Rent, the Feossor, nor A. B. may not Enter upon the Lands; for no Re-entry is given to the Feossor, and the Entry given to A. B. is void in Law, for he is neither Party nor Privy. Dost. &

Sud 194.

By this Case we see the Difference between Parties and Privies to Deeds, and those who are Strangers.

Privies are favoured in Law: And between Jointenants there is a two-fold Privity, viz. of Estate
and Possession; between Tenants in Common
there is Privity only in Possession, and not Estate; but Parceners have a three-fold Privity,
viz. in Estate, Person and Possession. Strangers
to Deeds, shall not take Advantage of Conditions, to Enter on Lands, &c. but Parties and Privies, who have a more immediate Right, and the
Law knows not the others.

#### Surrenderg.

A Surrender is the yielding up of an Estate for Life or Years, to him who hath the immediate Reversion or Remainder, that he may have

the Possession of the same. Co. Lit. 337.

And there are two Sorts of Surrenders; a Surrender in Deed, or by express Words in Writing, and a Surrender in Law. To make a good Surrender in Deed, these Things are required, viz. the Surrenderor, or Person surrendering, is to be able to make the Surrender, and the Surrendree to whom made, capable to receive it. The Surrenderor must have an Estate in Possession of the Thing surrendered, and the Surrendree have the next Estate in Remainder or Reversion. There is also to be Privity of Estate between the Parties; and the Surrendree is to have a greater Estate in his own Right in the Lands, &c. than the Surrenderor. Perk. 584. 2 Roll. Abr. 494.

If Lessee for Life or Years take a new Lease of the same Thing, it will be a Surrender in Law of the former Lease: And this Surrender in Law,

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by taking a new Leafe, holds good, though the fecond Leafe is for a less Term than the first; and it is said, although the Leafe be voidable. 5 Rep. 11. 10 Rep. 66.

In all Deeds and Conveyances of Estates, the Parties making them and taking thereby are to be eapable thereof; and there are certain Requisites to make them Perfect, agreeable to their Nature. A Surrendree in Deed is to have a higher Estate than the Estate of the Surrenderor, because his Estate must be merged or drowned therein. And where there are two Leases of the same Land, both cannot stand together in one Person; and therefore accepting a second Lease is a Surrender in Law of the first, otherwise it would be made to no Purpose.

## Sufpence.

Suspence is a Stop, or hanging up, of a Man's Right; as when any Rents, Oc. by Reason of the Unity of Possession thereof, and of the Land, out of which they Issue, are not in ese for a

Time, but may be revived or awaked again.

But a Thing or Action Personal, being once suspended (the but for an Hour) is Extinct and gone for ever, when it is by the Act and Consent of the Party himself, who hath the Thing suspended: As if a Feme Obligee marry with the Obligor, and afterwards they are Divorc'd, Causa Pracontractus, the Debt is extinct: And if a Debtee makes the Debtor, and another which survives the Debtor, his Executors, yet the Debt is extinct for ever, Gc. Dyer 140.

When Part of a Condition is suspended, the Whole is suspended: And if a Lessor doth any Thing which amounts to an Entry on the Lesse,

#### D2, The Reason of the Law.

the Possession in him is sufficient to suspend the Rent, until the Lessee do some Act which amounts to a Re-entry. 4 Rep. 52. Vaugh. 109.

Land, &c. being absolutely conveyed, the Rent

is Extinct.

Suspence differs from Extinguishment, in that what is suspended may be Revived, but what is Extinguished dies for ever. But this is understood of Things in the Reality, and not of Personal Things, which being once in Suspence, are for ever gone; and the Reason of it is, that when a Personal Thing is Discharged or Suspended, it is not known afterwards where it is; as in Case of any Thing issuing out of Lands, which certainly remains to revive after a temporal Suspension.

#### Tail.

TAIL is a Fee opposite to Fee-simple; it is a fetter'd Inheritance, which is not in the Owner's free Power to dispose of, but is by the Donor tied to the Issue of the Donee.

And it is either General or Special; Tail General is that whereby Lands or Tenements are limited to a Man, and the Heirs of his Body begotten; and is general, for how many Women soever the Tenant Holding by this Title, shall take to be his Wives, one after another, his Islue by them all have a Possibility to Inherit one after another. Tail Special is that whereby Lands or Tenements are limited to a Man and his Wife, and the Heirs of their two Bodies begotten; in which Case, if the Man bury his Wife, without having Islue by her, and take another, the Issue by his

fecond Wife cannot Inherit the Land. Lit. 14,

16, 26.

If Lands are given to the Husband and Wife, and to the Heirs of their two Bodies, both of them have an Estate in Special Tail; If Lands and Tenements are given to a Man and his Wife, and to the Heirs of the Body of the Man, the Husband hath an Estate in general Tail, and the Wife an Estate for Life. And if the Estate is made to the Husband and Wife, and to the Heirs of the Body of the Wife, by the Husband begotten, there the Wife hath an Estate in Special Tail, and the Husband for Term of Life only. If an Estate be limited to a Man's Heirs, which he shall beget on his Wife, it creates a Special Tail in the Husband, but the Wife will be entitled to Nothing. Co. Lit. 22, 26.

Where Lands are given to a Man, and to a Woman which is not his Wife, and to the Heirs Male of their two Bodies, they have an Estate-Tail, although they be not married at that Time. And if Land be given to a married Man, and a married Woman, and the Heirs of their two Bodies begotten, this is a good Estate-Tail. 1 Inst. 25. 10

Rep. 50,

The Word Body, makes the Estate-Tail, which may be restrained to Males or Females of the Body, &c. All Lands of Inheritance, and all Inheritances savouring of the Reality; Rents, Profits, Uses, Offices, Dignities, &c. which concern Lands or certain Places, may be Entail'd: But if the Grant of an Inheritance be meerly Personal, or exercised with Chattels, and not issuing out of Land, it cannot be Entail'd. A Grant of an Annuity to a Man and the Heirs of his Body, is void: And so is a Lease for Years to a Man and the Heirs of his Body; but it may be Assign'd in Trust, for the

the Issue in Tail, &c. to receipthe Profits thereof, which is in Essect an Estate-Tail. 4 Inst. 87.

Entails are usually created upon Marriage Settlements: And it is incident to an Estate-Tail to be Dispunishable of Waste, that the Wise of the Donee shall be endowed; that the Husband of a Feme Donee shall be Tenant by the Curtesy; that the Tenant in Tail may suffer a Common Recovery, &c. 1 Inst. 224.

And by Recovery, Tails may be barr'd, Rever-

fions and Remainders, &c.

Estate-Tail was created by the Stat. of Westminfter; for at Common Law, all Estates were Feefimple. Tail General leaves the Estate generally to a Man's Issue, but Special Tail sets down of whom the Issue shall proceed. To whose Body the Word Heirs relates Generally or Especially, in him or her is an Estate-Tail General or Special created. But a General Tail and a Special Tail may not be made at one and the same Time. Where Persons are unmarried, there is a Possibility that they may Marry; and if two Persons are married, the Wife of the one, and the Hufband of other may die, and then the Marriage, that is requisite, may Ensue Personal Things may not be Entail'd, because they cannot be an Inheritance, and Estates Tail are Inheritances; an Annuity, which only chargeth the Person, therefore cannot be Entail'd. As Estate-Tail is an Inheritance, it hath divers Incidents and Priwhere a Man's Children or Family behave Difobediently, unnaturally, &c. For when Children act no longer as Children, but go notoriously Contrary to their Duty, and the Laws of God and Nature, they are no longer Children; nor is it unlawful or unjuft, in such extraordinary Cases, to cut them off, and leave the Inheritance to others, that are more Virtuous, and like unto him they represent.

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An Estate in Tail, after Possibility of Issue exitines, is where Lands and Tenements are given to a Man and his Wise in Special Tail, and either of them dies without Issue had between them, the Survivor hath the Estate when there is no Possibility of Issue, &c. and so if they have Issue, and they die, so that there is not any Issue alive, which may Inherit by Force of the Entail. Lit. 32. 1 Inst. 29.

When a Man and his Wife are Tenants in Special Tail, and the Wife dies without Children, the Law feeth an apparent Impossibility of Issue: But if they both live till they are one Hundred Years old, and have no Issue, the Law will not see any Impossibility of their having Children.

#### Tender.

Tender is the Offering of Money or other Thing in Satisfaction: As a Tender of Rent is to offer it at the Time and Place, when and where it ought to be paid. And it is an Act done to fave the Penalty of a Bond, before Action brought. Also Tender of Money is required on Contracts, to entitle Actions for Goods fold, &c.

A Tender of Rent on the Land, of the whole due, at any Time of the last Day of Payment, will save the Condition to the Tenant for that Time, altho' the Landlord refuse it: But he may after the Tender, bring Debt, though he cannot recover any Damages. I Co. Inst. 200. Tender of Money on a Bond, is to be made to the Person of the Obligee, at the Day appointed, to save the Penalty, and it ought to be done before Witnesses, yet if the Obligor be sued afterwards, he must still pay it, and bring the Money into Court. If the

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the Obligor be to do any collateral Thing, as to deliver a Horse, &c. and he tenders to do his Part, but the Obligee resuseth it, the Condition is performed, and the Obligation discharg'd for ever. I Inst. 207, 208.

Tender may be of Money in Bags, without shewing or telling it; if it can be proved there was

the Sum to be tender'd. 5 Rep. 115.

A Lessee's Tendering, and being ready to pay, excuses the Damages, but doth not depar the Landlord of his Rent: And in Action of Debt, Tender and Resusal may be Pleaded in Bar of the Damages, though not in Bar of the Action, as the Debt still remains. A Tender is not well Pleaded without a Resusal; for it is the Resusal that makes it a Payment in Law, as to a Collateral Act, &c. It is the Duty of him that is to receive Money tender'd, to put out and tell it.

#### Tenants.

TEnant signifies him that holds or possesset Lands or Tenemenrs by any Kind of Right, be it in Fee, for Life, Years, or at Will; but most

commonly for Life or Years.

If Tenant for Life, sow the Land, and die before the Corn, &c. is reaped, his Executors shall have the Emblements or Products of the Land: But they shall not have the Grass, or other Fruits, if they are not severed. If Tenant for Term of Years, sows the Land, and his Term expires before the Corn is Ripe, the Landlord shall have it, unless it be covenanted between them, that the Tenant shall have his Crop at the End of the Term. Inst. 55,68.

If a Man hath Land, in Part whereof is a Coal-Mine open, and he Demiseth the Land to a Tenant for Life or Years, such Tenant may dig in the Mine, it being open at the Time of the Lease made. Where a Man makes a Lease of Lands, wherein there are Mines which are hidden, and Grants the Lands and all the Mines in the same, the Tenant may also lawfully Dig for them: But if a Man Lease his Lands to a Tenant, in which there is a hidden Mine, and Mines are not mentioned in the Grant, he cannot Dig for them; if he do, it is Waste. 5 Rep. 12.

By Law the Tenant has a Privilege to fell Trees for the Reparation of Houses, &c. And if a House falls down, the Tenant may rebuild the same with Timber and Materials remaining on the Lands; tho' he cannot justify be lding the House either less or larger than it was before; or sell the Trees, and with the Money erect it; for the Sale will be

Waste. 1 Inft. 53.

A Tenant for Life or Years of Land, hath a Special Interest or Property in the Trees, so long as they are annexed unto it: But if the Lessee, or any other, sever them from the Land, the Property and Interest of the Tenant is thereby determined, and the Landlord may take them. 4 Rep. 64.

To suffer Houses to Decay, cut down Timber-Trees (unless for Reparations, &c.) plough Lands that have not been Ploughed up Time out of Mind, Dig Quarries of Stone, Minerals, &c. enclosed in the Earth, without express Covenant, are Waste. Also the taking away, or breaking down Wainscot, Doors, Windows, Benches, &c. fix'd to the Freehold, is Waste; but if they are fix'd by the Tenant, they may be taken down by such Tenant before the Term is expired, so as he do not thereby endamage the Freehold, but leave the

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the same in as good Condition as at the Time they

were fixed up. 1 Salk. 368.

If an House be destroyed by Tempest, Thunder, and Lightning, or other Act of God, Floods, Enemies, Oc. this is not Waste in the Tenant: But if the Tenant Covenant to Repair, it may be otherwife. I Inft. 53.

Where Tenants for Life, in Tail, &c. Sow Land and die, their Executors shall have the Corn, because their Estates are uncertain, and determine by the Act of God: But Tenant for Years has a Term certain, so that it shall be judged his Folly to fow the Land, when he knew the Term would expire before it was Ripe. Where Mines, &c. are granted, the Means to make Profit of them is also granted. Timber may be felled by Tenants for Repairs of Houses, because of the Necessity of it; and to futfer Houses to Decay, which is a Wrong to the Inheritance, is Waste. Timber-Trees are Accessary to the Land while annexed unto it, so that the Tenant has a Special Property in them; but when fever'd, they are Parcel of the Inheritance. To Plough Lands, not usually ploughed, is Waste, because it Impoverishes an Estate : And Quarries, &c. enclos'd in the Earth, a Tenant may not meddle with, without Covenant for it, the Tenant being entitled only to the Products of the Surface, not what is buried in the Bowels of the Earth; which belongs and is fix'd to the Freehold of the Land. If a House is subverted by Tempest, Thunder, Lightning, &c. it is not done by any Default or Concurrence of the Tenant, who could not poffibly prevent the same, and therefore the Te-nant shall be excused: But if he expressy Covenant to Repair, by it he undertakes to undergo all Cafualties, though not by Covenant in Law. stil stondy and

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#### Tenures.

Tenure is the Manner whereby Lands or Tenements are holden, being the Estate of the Tenant in the Land: And all Lands in the Hands of a Subject, are held of some Lord or Landlord, by Tenure or Service. 1 Inst. 93. 2 Inst. 531.

Tenures and Services were anciently very many, viz. Knights Service, Escuage, Homage Ancestrel, Burgage, Villenage, Grand Serjeanty, Petit Serjeanty, Frankalmoign, Socage, &c. Knight Service was a Tenure, whereby feveral Lands in this Kingdom were held of the King, or the Mesne Lord, which drew after it Service in War, Homage, Escuage, &c. Escuage is a Service of the Shield, whereby the Tenant was bound to follow his Lord into the Wars at his own Charge. Homage Anceftrel is where a Man and his Ancestors have, Time out of Mind, held their Land of the Lord by Homage; and fuch Service draws to it Warranty from the Lord, and Acquittal of all other Services. Burgage was an ancient Tenure proper to Boroughs, whereby the Inhabitants by Custom held their Lands or Tenements of the Lord of the Borough at a certain Rent. Villenage was a base Tenure of Lands, Oc. whereby the Tenant was bound to all fuch Services as the Lord commanded, or were fit for a Villain or Bondman to perform. Grand Serjeanty is a Tenure whereby one holds his Lands of the King, by fuch Services as he ought to do in Person to the King at his Coronation, Oc. And Petit Serjeanty is when a Man holds Land of the King, to furnish him yearly with some small Thing towards his Wars. Frankalmoign is a Tenure by Spiritual Service, where an EcclesiEcclesiastical Corporation holdeth Land, to them and their Successors, of some Lord and his Heirs, in free and perpetual Alms. Socage is a Tenure by which Tenants held their Lands, to Plough the Land of their Lords with their own Ploughs, and do other inserior Services of Husbandry, &c. Bract. lib. 5, 2. &c. Lit. Sect. 85. 1 Co. Inst. 105.

Lit. Ten. 133, 117, Oc.

The common Tenures, or holdings of Lands at this Day, are Fee-simple, to a Man and his Heirs for ever; Fee-tail, a limited Estate to a Person and the Heirs of his Body, &c. By the Curtesy, where a Husband having Issue by his Wise, born alive, holds her Lands after her Death, during his Life. In Dower, when a Wise holds a Third Part of the Husband's Estate during her Life, after his Decease. For Term of Life or Years, under certain Rents and Services. And by Copy of Court-Roll, in Fee or for Life, being a base Estate. Co. Lit. 9, 18, 22, 30, 31, 43, 58, 60, &c.

There can be no Tenure without some Service, because the Service makes the Tenure. And according to Littleton, all the Lands in England were divided between the two Tenures of Knights-Service, or Chivalry, and Socage; and Socage was either Liberum Socagium, where the flavish Services were turned into the Payment of Money yearly, or willanum Socagium: But by Stat. 12 Car. 2. c. 24. Tenures by Knight-Service, &c. are taken away. and all Tenures shall be adjudged to be turned into Free and Common Socage. He that hath Fee. though he hath Jus perpetuum in Land, owes a Duty for the same; for no Man hath Directum Dominium, but the King in Right of his Crown: And Fee is generally where a Person holds Lands in Nature of a Benefit, from and of another. It has been observ'd, that Estates were originally at Will. term'd Munera; after were for Life, call'd Beneficia; and afterwards made Hereditary, and then term'd

term'd Feeda, or Fee-simple, &c. which it is said was first granted by King William 1. called the Conqueror, to his Followers, to uphold him on the Throne of these Realms.

## Trespats, Battery, &c.

TRespass, in its common Acceptation, signifies a Wrong or Damage done by one private Man to another: And is Trespass General, otherwise term'd Vi & armis; and Trespass Special, otherwise called Trespass upon the Case; which seems to be without Force, but sometimes they are mixed and consounded. In an Action of Trespass, the Plaintist always sues for Damages, or the Value of the Hurt done him by the Desendant.

An Action of Trespals, Vi & armis, doth lie for him that hath the Possession of a House, Lands, or Goods, if he be disturbed in his Possession. And Trespals may be brought for breaking a Man's Close, taking away Pales, breaking of Fences or Doors, &c. chasing of Cattle, fishing in another Man's Pond, &c. But if divers Actions of Trespals are brought for one and the same Cause, with an Intent only to vex the Desendant, on Proof thereof made to the Court by Assidavit, the Court will order the Plaintiss to join all his Actions into one, if it may be done. But Trespasses of several Natures cannot be laid together in one Action.

1 Inst. 57. 2 Lill.

Though the Law allows Entries in divers Cases; as for a Man to Enter a Tavern, a Landlord to Enter to view Repairs, a Commoner to Enter Lands to see his Beasts, &c. If he that Enters a Tavern, commits a Trespass, or if he that Enters to view Waste, break the House, or the Com-

moner cut down Trees, in these, and the like Cases, the Law shall judge that they Entered for that Purpose, and they shall be Trespassers from

the Beginning. 8 Rep. 146.

If a Trespasser drive away my Beasts over another's Ground, and I pursue them to rescue them, I am a Trespasser to him upon whose Ground I come; but if a Man assault my Person, and I sly over the Ground of another, I shall not thereby be a Trespasser. Bac. Max. 29.

Where a Corporal Hurt or Damage is done to a Man; as to beat him, Oc. if he, or the other

Party die, the Action is gone. Noy 5.

For Trespass a Recompense is to be made, which the Law calls Damages, for the Injury received: And where a Man is disturbed in the Possession of his House, Lands, or Goods, besides the private Injury done him, it is a Breach of the Publick Peace. Several Actions of Trespass, for the same Cause, may be join'd; for the Judges of the Law do not favour Vexations of the People, which the Law abhors, under a Pretence of doing Justice: But Trespasses of several Natures cannot be join'd, because they cannot be jointly try'd. The Law, in many Cases, judges of the Thing it self by the Act subsequent, as in Case of Entries, Trespasses, &c. But Personal Actions of Trespassion with the Person, because the Person himself that did the Forcible Injury, should make the Recompence, and to the Party himself, who felt the Injury, and not others for him who know nothing of it.

#### Treason.

HIGH Treason is defin'd to be an Offence committed against the Security of the King and Kingdom, and relates to the Life of the King or Queen, &c. Levying War, Counterseiting the Great Seal, the King's Coin, &c. which are Trea-

fon by the Common Law. 3 Inft. 6.

And to Compass or Imagine the Death of the King, Queen or Prince, or to Deslower the King's Wise, or his eldest Daughter, unmarried, or his eldest Son's Wise, or levy War against the King in his Realm, adhere to his Enemies, Counterfeit the Great Seal, Privy Seal, or Money, or wittingly bring salse Money in this Realm, counterfeited like the Money of England, and utter the same; to kill the King's Chancellor, Treasurer, Justices of either Bench, &c. in the Administration of Justice, are declared High Treason, by the Stat. 25 Ed. 3.

Intending Death, or Bodily Harm, &c. to the King, and fuch Intention declared by Printing, Writing, or Speaking, the Offenders shall be adjudged Traitors: And if any one shall send to a Foreign Prince to invade the Kingdom, shall affemble the People together to take the King into Custody; provide Arms to kill the King, or fend Letters to excite wicked People to do it, or shall be Guilty of any open Act, shewing a Design to depose or imprison the King; these, and such like, are a sufficient Declaration of compassing or imagining the Death of the King, and Overt Acts to make a Man Guilty of High Treason. But a Man Deprived of his Reason, as one Non Compos Mentis, cannot be Guilty of High Treafon.

fon, without using some Violence upon the King

or Queen's Person, Oc. 3 Inft.

If any Person shall maliciously, advisedly or directly, by Writing or Printing, declare or affirm, that the King is not lawful King, or that the Pretended Prince of Wales, &c. hath any Title to the Crown, he shall be Guilty of High Treason. And Preaching, Teaching, or advisedly speaking, &c. incurs the Penalty of a Pramunire. Hindering any Person who shall be next in Succession to the Crown, for the Time being, from coming to the Crown, is also made High Treason. Star.

As in Cases of Treason, there must be an Overt-Act; a Conspiracy, or compassing to levy War, is no Overt Act, unless a War is actually Levied; But if a War is actually levied, then the Conspirators are all Traitors, altho' they are not in Arms. And tho' compassing to levy War is no Overt Act, except a War is levied, yet the Meeting and Consulting to levy War only, will be a sufficient Overt Act, to prove the compassing and imagining the

Death of the King. H. P. C. 14.

If two, or more, conspire to levy War, and one of them only raises Forces, this shall be adjudged Treason in all. And Persons raising Forces for any Publick End or Purpose, as to reform Religion, or the Laws, to remove Persons from the Ministry, &c. and putting themselves in a Posture of War, by choosing Leaders, is a Levying of War, and Treason. But those that join themselves to Rebels, &c. for Fear of Death, and return the first Opportunity, are not Guilty of Treason. 3 Inst. 9, 10. Kel. 75.

Adhering to the King's Enemies, is giving Aid or Affiftance to them, either within the Realm, or without; delivering up the King's Forts, Oc.

Abroad or at Home. By 2 0 3 Ann. it is made Treason for any Officer or Soldier of this Realm to hold Correspondence with any Rebel, or Enemy to the King, or to give them any Advice, Information by Letter, Meffuage, &c. And if any Subjed within Great Britain or Ireland, or without the same, shall inlist himself, or promote any Perfon to lift with Intent to go beyond Sea, to ferve any Foreign Prince, State, Oc. as a Soldier, without the King's Leave, he shall suffer and forfeit. as in Cases of Treason. Stat. 12 Ann.

Compassing to counterfeit the Great Seal, is not Treason; there must be an actual Counterfeiting, and it must be like the King's Great Seal: Those who Aid and Confent to the Counterfeiting of the King's Seal, are equally Guilty with the others.

2 Co. Inft. 15.

Not only those who Counterfeit or Coin Money, without the King's Authority, are Guilty of High Treason; but also those who have Authority to Coin Money, if they make it of greater Alloy or less Weight than they ought. Clipping, Washing, or Filing, &c. the Coin of this Kingdom, is made High Treason; but then there arises no Corruption of Blood, Loss of Dower, Oc. 5 Eliz. 8 6 0 W. 3.

When a Person is indicted for Treason, whereby Corruption of Blood may be made, he shall have a Copy of the Indicament five Days before Trial, to advise with Counsel, Oc. And shall be admitted to make a full Defence by Counsel learned in the Law; his Witnesses shall be examin'd fully on Oath, and he shall not be Tried or Attainted, but by the Oaths of two lawful Witnesses to the same Overt Act, to be produced Face to Face.

7 W. 3. 6. 31:

## Di, The Reason of the Law. 259

Treasons committed out of the Realm, may be tried in the King's Bench by good and lawful Men, as if the Offence had been committed in the County of Middlesex; or before such Commissioners, and in such County, as the King shall appoint. And on the late Rebellion, it was enacted that High Treason committed within the Realm, might be tried in any County, but extended only to Persons in Arms, Gc. Stat. I Geo. 1.

The common Judgment in High Treason is, that the Offender shall be Drawn, Hang'd and Quarter'd, &c. But where a Peer commits Treason, the King usually remits all but Beheading; though for Murder, a Peer ought to be Hang'd, and not Beheaded. 3 Inst. 31.

He that offends the Commonwealth, is under an Obligation to yield Satisfaction to it; and as Debts are Discharged to private Persons by Payment, fo Obligations to the Publick, for diffurbing Sociery, are Discharged when the Criminal undergoes the Punishment affix'd to his Crime. Crimes bught not to go unpunish'd; and evil Men fear to Offend for Fear of Pain: It is therefore Necessary that Pains should be ordain'd for Offences. As the King is the Head and Safety of the State, Attempts, and even Intentions, against him, are more Criminal than against any other Persons; and the Punishment hath the greater Severity, to thew the Greatness and Odiousness of the Offence: The King's Title ought to be own'd by his Subjects, because derived to him by Law, and the King not only owns, but protects his Subjects. In Levying War, & the People are not to do any Acts for publick Reformation, of which they are not Judges: But without Overt Acts, there cannot be regularly any Proof of Treason. Enemies to the King are those that are out of the Allegiance of the King, and not Subjects, either in War or Rebellion, who are Traitors. Soldiers are the Defence

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Defence of a Kingdom, and should not go into a Foreign Country, without Leave, because they may Fight against it. The King's Great Seal is of that high Concernment for his Honour, that it ought to be the highest Crime to Counterfeit it; as likewise the Coin, which is the King's, and the visible substantial Credit of the Nation. In Treason there must be two Witnesses, because of the heavy Penalty attending it, viz. Forseiture of Estate, and Corruption of Blood, &c. Beheading being Part of the Judgment for Treason, the King is satisfied with it, to a Peer; but for Murder he cannot, because it is no Part of the Judgment.

Misprission of Treason is where a Man knoweth of any Treason, and conceals the same; but it must be a bare Knowledge only, for if he Consent to the Treason, he is a Traitor. H. P. C.

127.

Where one knew that another had committed any Sort of Treason, and did not Discover the same to the King, or his Privy Counsel, or some Magistrate, this bare Knowledge and Concealment, was High Treason at Common Law; though now a Man must Assent to some outward Act, to make it Treason; as where one having Notice of a Meeting of Conspirators against the Government, goes into their Company, and hears their Treasonable Consultation, and Conceals it. 3 Inst. 138.

If one be only told in general, that there will be a Rebellion, without knowing the Perfons concern'd in it, or the Place where, &c. this uncertain Knowledge may be conceal'd, and it shall not

be Treason.

Concealment of Offenders is a very great Offence; for by that Means Traitors are permitted, if not enabled to perpetrate their Treasons. Whenever a Crime is known, the Criminal ought not to be

## D2, The Reason of the Law. 261:

let go, before brought to Justice; and Assent to any Criminal Act, which shews an Approbation of at, makes a Man, in some Measure, Partaker of the Crime.

#### petit Treason.

PEtit Treason is a Crime where one out of Malice takes away the Life of a Subject to whom he oweth Special Obedience: As when a Servant killeth his Master, a Wife her Husband, a Secular or Religious Man kills his Prelate or Superior, to

whom he owes Faith, &c. 3 Inft. 20.

If a Wife and her Servant conspire to kill the Husband, and appoint Time and Place for that Purpose, but the Servant alone in the Absence of the Wife killeth him, this shall be Petit Treason in both. If a Wife or Servant procure a Stranger to kill the Husband or Master, in the Absence of such Wife or Servant, neither the Procurer or Actor are Guilty of Petit Treason, but of Murder only: But if the Wife or Servant be either actually present when the Crime is committed, or present only in the Judgment of Law, such Wife or Servant are Guilty of Petit Treason, and the Stranger of Murder. Dyer 128, 332, Moor 91.

Aiders, Abetters, and Procurers are within the Act against Petit Treason; and Persons Accused of Petit Treason, shall be judg'd either Guilty or Not guilty, Principal or Accessary, according to the Rules of Law in other Cases: So that if the Fact appear to have been done upon a sudden falling out, or in the Party's necessary Self-Desence, Occasion cannot be Petit Treason. H. P. C. 24.

To commit Violence on any Person to whom we owe Obedience, though it be not the King, but a Subject, adds to the Transgression; and it is a Kind of Petit Rebellion, to be Guilty of Petit Treason. When a Wife, &c. procures a Stranger to Murder her Husband, and is present when done, she the is a Principal Offender, for her Presence makes the A& she procured, as it were, her own; and if she be present in Judgment of Law, as being in the same House, &c. it shall be sufficient. Where there is no Malice, the Law always extenuates the Crime of an Offender.

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#### or I elleron helu hills ha Prelate or Superion, Trials. direct 29 wo be mad be

RIAL is used for the Examination of all Caufes, Civil or Criminal, before a Judge,

according to the Laws of the Realm.

Wire bor Hughard, a be

My Lord Coke tells us, that the most general Rule is, that every Trial shall be out of that Town, Precinct, Ge. within which the Matter of Fact Triable is alleged, or the nearest thereunto, for the better Knowledge of the Fact committed. But when an Indictment is found against a Person, in the proper County, it may be heard and determined in any other County, by Special Commission, though the Trial ought to be by Jurors of the proper County. In Cales of Murder, Felony, c. the Offence shall be tried where the Indictment is taken, if no Special Commission be sued out. 1 Inft. 125. 3 Inft 27.

If a Criminal confesses his Crime, the Court has no Occasion to proceed to Trial, they have then Nothing to do but to pronounce Sentence as the Law directs for the Crime he confesses But if a Criminal stand Mute, out of Stubborness, or if he hath cut out his Tongue, or he does not Plead di-

rectly to the Fact, or put himself upon Trial by his Country, he shall be put to the Penance, Pain fort & Dure, in Cases of Petit Treason and Felony, and forfeit his Goods, not his Estate: But in Cases of High Treason, and Appeal of Death, if the Criminal stand Mute, he shall nevertheless have Judgment as if he were tried and convicted he as Inst. 177. 3 Inst. 217, 227. 11 Rep. 30.

In Criminal or Capital Cases, after Conviction, a new Trial may be Granted, on Cause shewn: But it shall not be generally after Acquittal. Where a Man is Acquitted upon his Trial, on a malicious Prosecution, he shall have a Copy of the Indictment, and a Certificate from the Judge, that he was acquitted thereof, whereupon he may bring his Action for Damages, or indict the Pro-

fecutor. 6 Rep. 14. 2 Lill. 606.

Our Law exceedingly Favours Trials, especially of Criminals. In common Cafes the Trial muft be had in and by Jurors of the County where the Fact was committed; and Special Commissions are foldom issued, but to expedite or facilitate Jutice in panishing Offenders. Confession is stronger than where a Person is found Guilty on Trial; for though he be found Guilty by Verdict, yet he may be Innocent, which cannot be supposed where he confesses. When a Felon refuseth to Plead. there may be no Trial and Conviction, to incur Forfeiture of his Estate; for Preservation whereof to their Families, some stout Hearted Criminals have undergone Pain fort & Dure, and been press'd to Death. A Man being Tried and Acquitted, he has generally answer'd the Law. And where a Person, on an unjust Prosecution, is acquitted he shall have Damages, &c. in some Messure to Repair his injur'd Reputation.

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In Civil Cases, Real Actions, and Causes grown to Issue, are tried by a Jury of twelve Men of the County where the Cause of Action arose, whether they are brought down in Time of Vacation, &c.

A Trial in Court, where the Issue tried is not joined, is not good, except it be in Case of an Issue in Chancery in the Petty-Bag Side, and from thence sent to be tried in B. R. On due Notice given of Trial, the Desendant must proceed to Trial, or Judgment shall be had against him by Desault: And if a Plaintist neglects to bring his Cause to Trial, or resules to try his Issue after it is join'd, in such Time as he ought by Course of the Court, the Desendant may take a Venire facias directed to the Jury, to try the Cause by Proviso. Comp. Attorn. 324. 23 H. S. c. 15.

When excessive Damages are given by a Verdict, the Verdict is given against Evidence, there was a Surprise had in the Trial, or any Fraud, &c. the Court will order a new Trial. And in Matters of great Weight and Difficulty, or where the Title in Question is intricate, the Judges above, upon Motion and Oath made, that the Matter to be tried is very Difficult, or of great Value, will order a Trial at Bar; and then the Jury and Witnesses must attend the Courts at Westminster.

1 Inft. 227.

Trials at Bar are appointed by the Stat. Westm.

2. where the Cause requires Magnam Examinationem; and Officers of the Court, &c. may infist upon a Trial at Bar, after which a new Trial is not to be granted. 2 Salk. 648.

There must be an Issue join'd to bring the Matter before the Jury: And Trials are to be brought on in Time by the Plaintiss, or the Desendant may try the Cause, to free himself from the Trouble, and recover Damages for unjust Vexation.

## De, The Reason of the Law. 263

New Trials may be had on good Cause shewn, but not otherwise, which would weaken the Common Laws, to the Prejudice of the People. Trials at Bar are more solemn and satisfactory than Trials at the Assisses, but the Court of B. R. is not to be too much loaded with Trials of Causes and Matters of Fact, because it would hinder Proceedings in Matters of Law, the proper Business of the Court.

The Judges may in all Transitory Actions alter the Venue, from the Place where by the Law it ought otherwise to be, if they believe there cannot be an indifferent Trial in the County where the Venue was first laid. 2 Lill. Abr. 634.

Because the Judges are bound, as much as in them lies, to see that equal Justice be done.

#### Merdia.

TErdict is the Answer of a Jury made in any Cause, Civil or Criminal, committed by the Court to their Trial: And it is General, or Special. General Verdict is that which is given or brought into Court, in like General Terms to the General Issue : as where the Defendant in Disseisin, &c. Pleads no Wrong, the Jury bring in for the Plaintiff, that it is a Wrong, or for the Defendant, that it is no Wrong. A Special Verdict is when they fay at large, that such a Thing they find to be done by the Defendant or Tenant, and declaring the Course of the Fact, as in their Opinion it is prov'd, as to the Law, upon the Fact, they pray the Judgment of the Court. And where a criminal Fact is found Specially, it is sometimes referr'd 4:11

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referr'd to the Lord Chief Justice of B. R. and all

the Judges, Oc. 1 Co. Inft. 226, 227.

There is also a Privy Verdict given in some Special Cafes, which is taken out of Court, but then the Verdict must be afterwards pronounced in Court; and the Jury when they come into the Court may, if they think fit, Diffent from it, and give a contrary Verdict to that which they gave privately, before recorded, which last Verdict shall stand. And no Privy Verdict can be given in Criminal Causes, as Felony, Oc. 3 Inft. 110.

Raym. 193.

The Plaintiff and Defendant may consent to have the Jury find a Special Verdict; but though they do give such Consent, the Jury may give a General Verdict. In all Cases and all Actions, the Jury may give a General or Special Verdict, and the Court is bound to receive it, if pertinent to the Point in Issue; and if the Jury doubt, they may refer themselves to the Court, but are not oblig'd fo to do. A Special Verdict in Civil Cases, ought to be prepared by Counsel, and be delivered to the Jury to confider of before they deliver their Verdict in Private to the Judge: And when the Court doth direct the Jury to find a Special Verdict, one of the Counsel on each Side are to agree upon the Notes of it, and give them in under their Hands to the Jury. 2 Lill. 645. 3 Salk. 373.

If the Jury will take upon themselves to find, contrary to the Directions of the Courty any Thing in Matter of Law, the Court will receive the Verdict. And the ancient Course of laying a Fine on Jurors, barely for giving a Verdice against the Directions of the Court, &c. is condemned as Illegal: But the lary in this Cafe had best take Care they do not incur the Penalty of Attaint,

for a false Verdict. Where a Verdict finds Marter uncertainly, it is infufficient, and no Judgment. shall be given thereupon; as if an Executor plead Plene Administravit, and Issue is joined. thereupon, and the Jury finds that the Defendant hath Goods in his Hands, but find not to what Value, this is uncertain and insufficient: So a Verdict that finds Part of the Issue, and nothing for the Relidue, is insufficient for the Whole; for they are charged to try the whole Issue. A Verdict must in all Things answer the Issue; though if the Jury find the Issue and more, it may be good for the Issue, and void for the Relidue. Upon an imperfect Verdict, a Jury shall be summoned to try the Caufe again. But if a Verdict may be any Ways construed to make it good, there ought not to be a Construction of it to make it void. Co. Lit. 227. 1 Lev. 142. 2 Lev. 253.

A. brings Writ of Annuity against B. and they being at Issue, the Jury found for the Plaintiff, and also the Arrearages, but did not Assess any Damages or Costs; the Verdict was Impersect, nor could it be supply'd by a Writ of Enquiry of Damages; but the Plaintiff released his Damages and Costs, and thereupon had Judgment. 11 Rep. 56. If in an Action upon the Case, brought for speaking of Scandalous Words, the Jury find that the Defendant did speak Words which are Actionable; but it appears that the Words found are not expressed in the Declaration, this is not a good

Verdict. Trin. 23 Car. B. R.

A Verdict found against a Record, which is of a higher Nature than any Verdict, is a void Verdict. But a Decree in Chancery is not a Record, but a Decree Recorded, the Chancery being no Court of Record, unless it be touching Things agitated

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tated in the Petty-Bagg Office. Style's Reg. 600,

635.

The Statute of Jeofails helps Errors after Verdict, in Personal Actions; but not in Criminal Causes or Real Actions, Actions Qui tam, &c. 2 Lill. 647.

A General Verdia is generally brought in by a Jury: but in extraordinary Cafes, it is usual to bring in a Special Verdict, that the Truth may be the better Discover'd and Discussed, and Justice Administred. Privy Verdicts are fometimes given in when the Court is up, but Verdicts given in open Court are the best. In Criminal Cases, which concern Life and Member, Privy Verdict may not be given; because in these Cases the Jury are commanded to look upon the Prisoner. and so the Prisoner should be present, which he is not. The Notes of a Special Verdict in a Civil Cause, are to be agreed upon by the Counsels, that the Verdict may be perfectly drawn up, otherwise the Judges will not argue the Matter. The Jury may find according to their Knowledge and Consciences, though it should be contrary to the Directions of the Court; but this must be done with great Caution. Upon uncertain and insufficient Verdicts, no sufficient Judgment can be given. But where a Verdict may be good, it shall be made so for the Preservation of Things, and that nothing may be fruitles, or done in vain. Words in the Declaration only are put in Issue, to the Jury, to be Tried, and none others. A Record proves it Self, and proves a Verdict against it falle. The Court of Equity in Chancery is not of Record, but what is called an Arbitrary Court.

If a Juryman withdraw from his Fellows, or keep them from giving their Verdict, without giving any Reason, he shall be Fined; but if he differs from them in Judgment, in the Verdict, he shall

#### D2, The Reason of the Law. 269

shall not be Fined. If the Jury after the Evidence given unto them at the Bar, do at their own Charges Eat or Drink, either before or after they are agreed on their Verdict, it is Fineable; but it shall not avoid the Verdict: But if, before they be agreed on the Verdict, they Eat or Drink at the Charge of the Plaintiff, if the Verdict be given for him, it shall make void the Verdict: If it be given for the Defendant, it shall not avoid it. And if after they are agreed on the Verdict, they Eat and Drink at the Charge of him, for whom they do pass, it shall not make the Verdict void. I Inst. 228.

Conscience allows a Juryman to differ in Judgment from his Fellows, but then he may not prevent them from the Exercise of their Judgments. For Prevention of salse Verdicts, the Law is very careful in fixing the saulty Verdict, on the saulty Person only. And after the Jury are Agreed, it can be no Bribery or Crime to Eat or Drink at the Charge of either Party; nor before, at their own Charge, though it is Fineable, because it is contrary to the Direction of the Law, and they ought not to do it but by the Consent of the Judges, in Cases of Sickness, &c.

In Capital Cases, if the Jury do not all agree upon their Verdict, they may be carried in Carts after the Judges round the Circuit till they are agreed; and in such Case they may give their Verdict in another County. 1 Inst. 217. 1 Vent. 97. 2 Hawk. P. C. 211.

A Verdid must be adually given in Criminal Cases, where the King is Party, and the Jury managed accordingly.

### Wice, Crufts.

A N Use may be raised two several Ways, elector by Transmutation of the Estate, of without it. Those that arise by Transmutation of Estate, are by Feosfment, Fine, Recovery, &c. and those that arise without Transmutation, are by Bargain and Sale Inrolled, and Covenant to stand seised to Uses. Plowd. 301. 1 Rep. 121.

There must be a Consideration to raise those Uses that rise by Bargain and Sale, and Covenant to stand seised; as Consideration of Money, Natural Love, &c. But Uses may be good to a Man's Self or Family, without any Consideration, though

not to others.

Privity of Estate, and Considence in the Party, are the two great Pillars by which Uses are supported. And Uses may be made to a Man and the Wise he shall afterwards Marry, or to the Use of his first, second, or third Wise, Oc. If Parties to a Deed, declare that one of them shall make a Feossment, Levy a Fine, Oc. to the Use and Intent, that one shall hold for his Life, and after his Death another in Tail, and after that a Third in Fee simple, Oc. the Estate settleth according to the Use and Intent of such Deed declared by Virtue of the Statute 27 H. 8. c. 10.

A Man may settle Lands to Uses, and reserve Power to make further Uses; but if Lands are once sold, and settled to Uses, the Party makes the Uses, may not create any surther Uses: And when the Estate, out of which an Use ariseth, is gone, the Use is gone also. Uses may be made void by Release, Power of Revocation, &c. And where there is a Power of Revocation, a new De-

claration



#### Di The Reason of the Law. 271

claration of Uses is a sufficient Revocation of the former, without any Thing more: Also if a Man make his Will, and Devise the Lands, without making any express Revocation of the Uses, it shall be judged a good Revocation. 1 Inst. 237. Dyer

186. Hob. 312.

A Use and a Trust were all one at Common Law; but are now distinguished by the Statute of 27 H. 8. which directs the Operation of Uses. The Limitation of a Use was at the Common Law but a Matter in Equity, and the Party contern'd was relievable upon it, no other Way but in Chancery, as in Case of a Trust; but since the Statute, the Law takes Notice of them, and vests the Use in Possession. Style 646. Stat. 27 H. 8.

Land settled by the Trust, but hath only his Remedy for them in Equity; the Estate in Law in the Land being only in the Party that hath the

Truft. 2 Lill. 624.

The Chancery will compel one to perform a Trust which he hath taken upon him: But Conveyances by Way of Trust, are not so much favour'd as plain and direct Conveyances of Estates.

Uses were invented upon the Stat. of Westm. 3. till which Statute no Uses were known. And because in Time many Deceits crept into Practice, by fertling the Possession in one Man, and the Use in another, by 27 H. 8. it was Enacted, that the Use and Possession of Lands should always stand united. Before this, a Feoffee to whom the Deed was made to Uses, was Owner of the Land; but now those are Owners to whose Use he is Enfeeffed; for, as before the Statute the Possession ruled the Use, so now the Use governs the Possession. A Man who appoints Uses, may lawfully create further Uses, so long as he has a Right to do it; but when the Estate is fold and gone, it is no longer his, to settle to Uses. Uses, &c. not absolute,

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absolute, a Person may Revoke; and on a new Declaration of Uses, the old Uses are Revoked by Implication. Since the Statute of Uses, the Common Law takes Notice of them; but the Statute Law leaves Trusts as they were, and the Law generally takes no Notice of Trusts.

#### Afury.

Usury is the Gain of any Thing by Contract, above Principal Money Lent, exacted in Confideration of the Loan: And excessive Usury is liable to the Forseiture of treble Value of the Money taken, by Statute; and if Judgment cannot be given on the Statute, it may be given against the Party at Common Law, which is Fine and Imprisonment. 3 Inst. 151. 3 Salk. Rep. 391.

The Statute 12 Ann. c. 16. is called the Statute against Excessive Usury; and by this Act no Person shall take for the Loan of any Money, above the Value of 51. per Cent. per Ann. Interest, and so after that Rate for a greater or lister Sum, or shorter or longer Time, in Pain that all Bonds and Contracts to the contrary, shall be void; and the Receiver shall forseit treble the Value of the Money Lent, &c. It has been adjudged on this Statute, that a Contract for 6 per Cent. made bestore the Statute, is not within the Meaning of it. And if a Man continues old Interest on a Bond, the Bond shall not be void as Usurious. Rayme 197. I Hawk. P. C. 246.

A Fine levied, or Judgment suffered, as a Security for Money borrowed, may be avoided by an Averment of a corrupt Agreement, as well as any common Specialty. 3 Nelf. Abr. 509. But there can be no Usury without a Loan; and it is not Usury, if there be not a corrupt Agreement for more than

Statute

Statute Interest; and the Defendant shall not be punished, unless he receive some Part of the Money in Affirmance of the usurious Contract. 3 Salk. 390. I Lutw. 273.

If a Man by Special Agreement is to pay double the Sum borrow'd, &c. or extraordinary Intereft, by Way of Penalty, and in Lieu of Damages for Nonpayment of the principal Debt, it is not Usury : So, if the Interest exceeds ; per Cent. if possibly both Principal and Interest are in Danger; as if a Bond is to pay Money on the Return of a Ship from Sea, Gr. a Grant is made of an Annuity, or Rent-charge for Life, Ot. Cro. Jac. 509. 2 Roll. Abr. 801. 2 Inft. 89. 5 Rep. 69.

By the Divine Law, Usury was forbidden among the - Fews : And in former Times, if any one in this Kingdom, after his Death, had been found to bea Usurer, all his Goods and Chattels were forfeited to the King, &c. Our Statutes, on this Head, allow not Usury, but punish the Excess thereof. A Contract or Bond before the Statute, cannot be within it, any more than Offences be generally punish'd by a Law made ex post facto. A Loan, and by receiving Part of the Interest, the Agreement is executed. But when the Party may pay the Principal, and so discharge himself of the extraadjudg'd his Fault that he did not do it; and Damages are not confirmed as common Interest.

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ment way bing another Adion: it he auif the Defendant I wents that he haves the og base, and the Perform who are his Com-

#### Mager of Law.

When an Action of Debt is brought against one, upon some secret Agreement or Contract for Goods, Chattels, Money, Oc. lent or delivered the Desendant, the Desendant may wage his Law, if he will, that is, swear that he owes not the Money, or detains not the Goods, in Manner and Form as the Plaintiff, hath declared.

He that wages Law must also bring fix Compurgators with him, who are to fwear, that they believe he swears true; he is to stand at the End of the Bar, and the Secondary of the Court asks, whether he will wage his Law, if he answers he will, the Judges admonish him to be well Advised, and tell him the Danger of a falle Oath, and then he repeats the Oath after the Secondary, viz. Hear ye This, ye Justices, That I A. B. do not owe to C. D. the Sum of, &c. (mentioned in the Declaration) nor any Penny thereof, in Manner and Form as the faid C. D. hath declared against me. So help me God. Before he takes the Oath, the Plaintiff is called by the Cryer thrice, and if he do not appear, he becomes Nonfuited, and then the Defendant goes quir, without taking his Oath, but the Plaintiff may bring another Action : If he appears, and the Defendant swears that he owes the Plaintiff nothing, and the Persons who are his Compurgators do give in their Verdict, that they believe he swears true, then the Plaintiff is barred for ever. Co. Lit. 155, Oc.

#### Di, Che Realon of the Law. 275

The Defendant cannot wage his Law in an Action which ariseth upon the Reality; as for Arrearages of Rent, Or. which doth arise out of the Land. And Actions of Debt may be turn'd into Actions upon the Case, by Indebitatus Assumption, wherein the Defendant shall not wage his Law. 1 Infl. 295.

Where a Tellator or Intellate might have waged their Law, no Action will lie against the Execu-

tor or Administrator.

The Law intends that Wager of Law be only in Case of the Plaintist's Want of Evidence, and when he cannot prove his Suggestion, by any Deed, or open Act; as when the Contract upon which the Action is brought is a private Contract, and not to be proved, it may be intended that the Discharge may be in private, and not to be proved, but by the Oath of the Party, whom the Law will not presume will forswear himself. This Wager of Law was most practised in those Times that Knavery had not firm footing in this Kingdom; but since the Consciences of some Men are grown so large, the Law was forced to find out another Remedy, viz. Action of the Case, upon a Promise, which may not be dehied, as a Debte When a Person hath waged his Law, it is as much as if a Verdict had passed against the Plaintist; for all is done that the Law requires for Discharge of the Desendant.

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Arranty is a Promise or Covenant made by the Bargainor, for himself and his Heirs, to Warrant or Secure the Bargainee and his Heirs, against all Men for the Enjoying of the Thing

granted. Brack bib. 2.

A Warranty is Real or Personal; and Sir Edward Coke defines a real Warranty to be a Covenant Real annexed to Lands, whereby a Man and his Heirs are bound to Warrant the same to some other and his Heirs; and that they shall quietly hold and enjoy the Lands, and upon Voucher or by Writ of Warrantia Charta, to yield other Lands and Tenements to the Value of those that shall be evicted by elder Title. 1 Co. Inst. 365, 384.

Warranty is also of three Kinds, viz. Warranty Lineal, where a Man bindeth himself and his Heirs by Deed to Warranty and dieth, and the Warranty descends to the Heir; which binds the Right of Fee-simple, though not the Right of an Estate-Tail, unless there be Lineal Warranty with Affets in Feefimple. Warranty Collateral, where Tenant in Tail discontinues or Alienates the Lands, and then dieth leaving Issue, and the Uncle Releases to the Discontinuee with Warranty, and dies without Issue, this is a Collateral Warranty to him who is Issue in Tail, and bindeth his Right without Affets, it descending upon him, and he cannot make Title to the Entail from his Uncle, or shew that he is his Heir, &c. Warranty by Diffeifin, where one that hath no Right to the Freehold of another, entereth and conveyeth it away with Warranty: which shall not bind the Person Disseised. Lit. 697, 698, 703. I Inft. 374, 376.

#### De, The Reason of the Law. 277

By Statute, all Warranties made by Tenant for Life, of any Lands coming or discending on him in Reversion or Remainder, shall be void; and all Collateral Warranties made of Lands, & by any Ancestor, who had not an Estate of Inheritance in Possession therein, shall be adjudged void against the Heir. Stat. 4 & 5 Ann.

A Warranty is commonly added to a Deed of Feoffment; and Deeds of Gift and Exchange

have a Warranty in Law implied.

This Head is one of the most Ancient in our Law. concerning Inheritances. And it is reasonable a Man should Warrant to another what he lawfully conveys. The Statute of Gloucefter ordains that the Warranty of the Father shall be no Bar to the Son for the Lands coming by the Heritage of the Mother, &c. because of the Blood and particular Right he hath in him; though before that Statute, every Warranty which descended to those who were Heirs to the Warrantor, barr'd the fame Heirs to demand any of the Lands; And as to a Warranty descending, it is where, if no Deed with Warranty had been made, the Right of the Lands fhould have descended to the Heir, and he would have convey'd the Descent from Father to Son, &c. A Warranty is intire, and being lawfully made by Persons having Right, is generally a Bar against every Person on whom it Descends, of all the Right that he hath in the Land. est nome har son at Alley's son was

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# Tel me de la Celitnesse de la companya de la compan

A Witness is one that proves and makes out any Thing to a Jury, on a Trial, by Jawful

Testimony.

A Person Non sana Memoria; a Party interested in the Suit; a Wife for or against her Husband, (except in Case of Treason) Persons Attainted of salse Verdick, Convicted of Persons, or Subornation of Persons, Forgery upon the Stat. 5 Elizabene that by Judgment hath stood in the Pillory; and Persons convicted of Felony, not pardoned; an Alien Insidel, Ca. may not be Evidence; but a Jew, who may be sworn on the Old Testament; Kinsmen, the never so near related, Tenants, Servants, Attornies for their Clients, one of the Jury upon Trial, and others not Insamous, which want not Understanding, or are not Parties in Interest, may be Witnesses. 4 Inst. 279. 1 Vent. 197.

One that claims any Benefit by a Deed, may not be allow'd as a Witness to prove the Deed. One any ways concerned in the same Title of Land in Queltion, will not be permitted to be a Witness in the Canse. A Man that is made Executor of a Will, is not allow'd to be a Witness to prove that Will. And he that hath Lands given him by a Will, may not be a Witness to prove it; but if he hath only a small Legacy, or he Releaseth his Legacy to the Executor, he may be a good Witness to prove the Will. 2 Roll. Abr. 625.

2 Litt. 701, 704.

In a Trial which concerns a Corporation, Freemen of the Corporation may not be admitted as WitnefWitnesses for the Corporation, but other Inhabitants within the Corporation may. All these shew, that Witnesses must not be Interested in the Cause. And a Man cannot be a Witness in his own Cause, unless it be in Criminal Cases, as of Robbery on the Highway, Rape, &c. wherein a Man or Woman may be a Witness for themselves. 3 Rep. 37. 2 Lev. 231.

To a Jury one Witness may be sufficient; and in all Causes wherein the King is concern'd, the Testimony of one single Witness is a sufficient Testimony, except it be in Cases of High Treason only, for there must be two Witnesses. If a Witness serv'd with Process, resule to come and give his Testimony in a Criminal Cause, the Court will grant an Attachment against him.

And if it be in a Civil Cause, being tender'd reasonable Charges, the Party may have his Action upon the Case, to recover the Damages he hath received for want of his Testimony. 5 Eliz. 6. 9.

Persons Guilty of Crimes, who have sorfeited their Credit by Law, and those who are the least suspected of Partiality, are excluded from giving Testimony in a Cause. An Alien is a Stranger born, and hath not the Privileges of a Subject; but a Jew may be a Native, as we have many Jews amongst us; and therefore be a Witness. Awife may not be a Witness for her Husband, they being both one in Law; but Kinsmen, Servants, Sc. who act not for themselves, may be good Witnesses. Wherever any Person has an Interest, he may not be a Witness, for Witnesses must be ever Indisferent. A Man may not give Evidence in his own Cause, in Civil Cases; for the Law presumes he will be Partial in speaking for his own Advantage; but in Criminal Cases, of Robbery, Sc. he may give his own Evidence, because

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Crimes of this Nature may admit of no other Proof. Witnesses are to appear and give Testimony, at their Peril, without which Justice would not be done.

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A Writ is the King's Precept, whereby any Thing is commanded to be done touching a Suit or Action.

And Writs are variously divided; some, in Respect of their Order or Manner of Granting, are term'd Original, and some Judicial. Original Writs are those which are sent out of the High Court of Chancery, for summoning a Desendant in a Personal or Real Action, before the Suit begins, or to begin the Suit thereby: Those are Judicial, which are issued, by Order of the Court, where the Cause depends, upon emergent Occasion after the Suit begun. And Original Writs bear Date, Teste meipso, in the Name of or relating to the King: But Judicial Writs bear Teste in the Name of the Chief Justice of the Court. Nat. Brev. 51, 147.

Writs, according to the Nature of the Action, are Real or Personal: Real are either concerning the Possession of Lands, call'd Writs of Entry, or touching the Property, call'd Writs of Right: Personal Writs relate to Goods, Chattels, or any moveable Thing, Personal Injuries, &c. Some Writs are at the Suit of the Party; some of Office, some are Ordinary, others of Privilege: Also Writs are term'd Close Writs, and Open Writs. 1 Inst. 73. 2 Inst. 39.

An Original Writ is not Amendable, if it be Erroneous in Substance, by the Default of the Party who

Crime:

who gave Instructions for it; but if the Clerk, who makes out the Writ, commits any Error, it shall be Amended by his Instructions: And if a Judicial Writ be Erroneous, it may be Amended.

2 Lill. 716.

Original Writs, defective in Form only, are Abateable, if they are not Amendable by the Statute, as in some Cases they are, and in others not. Stat. 8 H. 6. And Variance between the Additions, Sums, &c. in the Writs and the Declaration. will Abate the Writs. A Writ without a Tefte, is not good; and there ought to be fifteen Days between the Teste and Return of Writs, where the Suit is by Original, Oc. If it be a Writ out of any of the Courts of Law at Westminster, it must bear Teste some Day in Term, (not Sunday, which is no dies Juridicus) wherein the Court did sit, or it is a void Writ; but the Court of Chancery being always open, Writs from thence may bear Teste as well in Vacation, as Term-Time. Lutw. 337-

After Judgment in a Cause, there can be no Plea pleaded in Abatement of the Writ upon which the Action was commenced. If a Party be sued to an Outlawry upon an Original Writ, the Writ is determined by the Outlawry; which was to make the Party come in and appear, and answer the Plaintiff, or else to Outlaw the Defendant, if

he should not appear. Siyle Rep.

There are a great many Remedial Writs, in the Profecuting of Actions; of which Originals are beyond Judicial Writs, and Real beyond Personal. A Close Writ, to call one to the Dignity of a Serjeant at Law, is said to be Close, (viz. scal'd up) to signify it is his Duty to keep Close his Clients Cause; but the Writ to call one to the Office

#### 28: The Student's Companion, &c.

fice of a Judge, is an Open Writ, to shew that his Duty is to do open Justice to all. Original Writs are not Amendable by the Common Law, for the Party may have a New Original; but a Judicial Writ may be Amended, because the Party cannot bring a New Writ, and he would be otherwise without Remedy. A Writ is to be proved by the Tese; and it may be sometimes Material when it was taken out: And all Writs are to be Return'd by the Sherists in the proper Court, unless there come a Supersedens. Writs are allow'd good, by after Pleadings and Proceedings to Judgment: But when a Party is once sued to an Outlawry, on Original, the Writ hath had its full Effect in the Law.

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